No. 82-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

A. G. BECKER INCORPORATED,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONER A. G. BECKER INCORPORATED

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QUESTIONS PRESENTED

This case seeks review of an unprecedented judicial delegation of administrative authority under the Glass-Steagall Act, one of the primary federal statutes governing the basic structure of the financial services industry in this country. This statute, enacted as a result of the national banking crisis fifty years ago, prohibits banks flatly and entirely from underwriting any corporate "notes or other securities." The specific questions presented are:

1. Did the majority below err in holding that the Federal Reserve Board is free to "adapt" the flat prohibitions of the Glass-Steagall Act on a "case-by-case basis" to the Board's own subjective view of "current business reality" and the "changing financial needs of our economy," when Congress itself has repeatedly refused to grant any exemptive or rulemaking authority over the Act's flat prohibition to any administrative agency?

2. Did the majority below err in endorsing a ruling of the Federal Reserve Board that allows banks to underwrite corporate commercial paper notes, when even the Board concedes that such notes are within the plain language of the Glass-Steagall Act and when this Court repeatedly has instructed that the language of this particular Act is to be construed broadly and applied literally?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (J.A. 220-257)[1] is reported at 693 F.2d 136. The decisions of the United States Court of Appeals for the District of Columbia Circuit denying, by a split vote, a joint petition for rehearing (J.A. 258) and a suggestion for rehearing *en banc* (J.A. 260) are unreported.

[1] Material printed in the Joint Appendix is cited as "(J.A.)".

The opinion of the United States District Court for the District of Columbia granting summary judgment in favor of petitioners A. G. Becker Incorporated ("A. G. Becker") and the Securities Industry Association ("SIA") (J.A. 194-219) is reported at 519 F. Supp. 602. The administrative determination of the Board of Governors of the Federal Reserve System (the "Board") (J.A. 122-143) is unreported. The Board subsequently issued guidelines "Concerning the Sale of Third Party Commercial Paper by State Member Banks" (J.A. 183-189). These guidelines are reported at 46 Fed. Reg. 2933 (June 1, 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 2, 1982. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on February 2, 1983. A timely petition for a writ of certiorari was granted on October 3, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action centers around two sections of the Glass-Steagall Act (the "Act").[2] Section 16 of the Act provides, in pertinent part, that "[commercial banks] shall not underwrite any issue of securities or stock * * *."

[2] Often referred to as the Glass-Steagall Act, the Banking Act of 1933, 48 Stat. 162, is codified in various sections throughout Title 12 of the United States Code. Sections 16 and 21 of the Act are set forth, respectively, in 12 U.S.C. §§ 24 (Seventh) and 378. By its terms, Section 16 applies only to national banks; this provision, however, is made applicable to state member banks of the Federal Reserve System, such as Bankers Trust Company, by Section 5(c) of the Glass-Steagall Act, 12 U.S.C. § 335. Section 21 by its terms applies to any institution that receives deposits.

Section 21 of the Act provides, in pertinent part:

> [I]t shall be unlawful * * * [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor * * *.

STATEMENT OF THE CASE

In 1978, Bankers Trust Company ("Bankers Trust") decided to test the flat prohibition of the Glass-Steagall Act, forbidding commercial banks to underwrite "notes or other securities," by attempting to become the first commercial bank to engage in the business of underwriting third-party commercial paper. To accomplish this goal, Bankers Trust commenced an aggressive oral and written promotional campaign, designed to convince corporations to retain the bank to market and distribute their commercial paper through the bank, rather than utilizing securities dealers, as these corporations theretofore invariably had done (J.A. 39-73). Effectively conceding the fact that it had crossed the line dividing the activities of securities broker-dealers from commercial banks, Bankers Trust's promotional materials emphasize the bank's access to a wider range of investors than "*other*" "commercial paper dealers" (J.A. 40, 43) (emphasis supplied).[3]

[3] Bankers Trust's promotional materials make clear that the bank has assumed the role of a securities underwriter. They boast of a sales distribution system "which rivals that of dealers" and which can "expand your commercial paper sales in a way that our competitors (either bank or dealer) cannot" (J.A. 41-42). The materials also go to great lengths to persuade corporate issuers that the bank's underwriting fee is "competitive with that of commercial paper dealers" (J.A. 40).

In response, A. G. Becker—one of the nation's largest commercial paper dealers—and the SIA—the securities industry's trade association—separately petitioned the Board to declare that Bankers Trust's commercial paper underwriting activities violate the Glass-Steagall Act. A. G. Becker, the SIA, and Bankers Trust all submitted briefs to the Board addressing the legal issues raised by the petitions. Upon the request of the Board, the Securities and Exchange Commission (the "SEC") submitted three legal memoranda to the Board, noting the interrelated structure of the federal securities laws and the Glass-Steagall Act, and expressing the SEC's legal opinion that commercial paper is a "note or other security" for purposes of the Glass-Steagall Act (J.A. 78-90, 91-98, 103-104).

A. The Board's Decision

The Board held that, "as a legal matter, * * * commercial paper is not a '[note or other] security' within the intendment of the Glass-Steagall Act" (J.A. 126). Although the Board admitted that commercial paper constitutes "notes," and conceded that the Act expressly prohibits banks from underwriting "notes," the Board nonetheless concluded that the statute "should not be interpreted according to its literal sense" (J.A. 131). The Board instead purported to adopt a "functional" analysis which, ignoring the bank's role in the distribution of these notes, concluded that the underwriting of these notes by banks could be analogized to a commercial bank loan and therefore should not be treated as a prohibited bank activity (J.A. 134-136).

The Board's ruling, however, also recognized that "potential[ly] unsafe or unsound" practices might proliferate if banks generally were to begin dealing in commercial paper (J.A. 141). The Board accordingly issued guidelines to regulate the underwriting of commercial paper by all state members banks of the Federal Reserve System (J.A. 186-189), while admitting at the same time that the guidelines could only "minimize the danger[s]" that concededly would flow from the commercial

paper underwriting activities the Board had sanctioned (J.A. 185).[4] The Board's ruling thereby not only permitted one bank to engage in these marketing activities, but authorized, and, in effect, encouraged, all member banks to do likewise.[5]

After the Board issued its ruling, A. G. Becker commenced judicial review proceedings under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, before the United States District Court for the District of Columbia, challenging the ruling as contrary to law. A similar action brought by the SIA was consolidated with A. G. Becker's lawsuit.

B. The District Court Decision

On cross-motions for summary judgment, the District Court (Joyce Hens Green, J.) held that commercial paper, which by the Board's own admission constitutes notes, falls squarely within the flat prohibition of Sections 16 and 21 of the Act, forbidding banks to underwrite corporate "notes" and "securities." The District Court rejected the Board's position that the Board could narrow the express statutory prohibitions contained in the Act, noting that "[t]he statute *** leav[es] no room for administrative amendment" (J.A. 214; 519 F. Supp. at 614).

The District Court also rejected the Board's "functional" argument that commercial paper, because of its relatively short maturity, the nature of its purchasers, as well as other non-bank

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[4] The guidelines state that member banks should limit their underwriting activities to commercial paper which is exempt from registration under the Securities Act of 1933. The guidelines also provide that member banks should market such commercial paper only to sophisticated investors (a term undefined in the guidelines), and only in large denominations (J.A. 187).

[5] The Board's unprecedented ruling had an immediate impact on the interrelated regulatory systems governing this nation's financial markets. *See, e.g.*, FERC, Order in Docket No. EL 81-5-000, March 27, 1981, 46 Fed. Reg. 19,980 (April 2, 1981) (J.A. 171-181) (issuing a temporary blanket exemption from certain provisions of the Federal Power Act because of the "abrupt change" caused by Board's ruling); SEC, Public Utility Holding Company Act Release No. 35-21967 (March 18, 1981), 46 Fed. Reg. 18,535 (March 25, 1981) (providing exemptions from provisions of the Public Utility Holding Company Act).

related factors, functioned more as a commercial loan than as a security. That analysis was fundamentally incorrect, the District Court declared, because it "ignores the specific conduct of the bank, glossing over whether the bank purchases commercial paper for its own account * * * or purchases for future sale to an outside party or arranges a transaction between purchaser and seller" (J.A. 217; 519 F. Supp. at 615).

Holding the Board's ruling to be contrary to law, the District Court concluded that the Board had improperly redrawn the Congressionally-mandated boundary between commercial and investment banking (J.A. 218; 519 F. Supp. at 616):

> [T]he Board should refrain from unique and heretofore unprecedented interpretations of the 1933 Glass-Steagall Act which cast such a long shadow as does the Board's ruling on the Becker and SIA petitions. The realignment of our nation's financial industries is for the elected representatives of our nation to bring to fruition by comprehensive legislation, and not for fiat by judicial decree or by administrative policymaking.

C. The Court of Appeals Decision

In a split decision, the Court of Appeals reversed the District Court.

1. The Majority Opinion

Although it conceded that the issue presented was purely legal in nature, the majority held that the Board should be free to "adapt" the Glass-Steagall Act, *on a "case-by-case basis,"* according to the Board's view of "current business reality" and "the changing financial needs of our economy" (J.A. 228; 693 F.2d at 141)(emphasis supplied). Despite the broad language of Sections 16 and 21 of the Act, and despite this Court's repeated direction that those terms are *not* to be construed narrowly, the majority concluded that the Board was empowered to accord the statutory language a "narrower meaning" (J.A. 235; 693 F.2d at 144). In the majority's view, the Board's revision of the statutory terms "notes" and "securities" to

include only "instruments for raising capital as part of the permanent financial structure of a corporation," while "implicitly permitting" banks to underwrite all other types of debt instruments (J.A. 236; 693 F.2d at 144), was an appropriate role for an administrative agency to perform.

The majority also addressed the Board's "functional analysis." While recognizing that, in a traditional loan transaction, a bank *purchases* commercial paper, the majority held that the bank here "is simply on the other side of the transaction" (J.A. 246; 693 F.2d at 150). Thus viewing the marketing role of the bank as immaterial, the majority focused instead on certain purported characteristics of commercial paper to conclude that such notes are not likely to give rise to the hazards at which the Glass-Steagall Act was directed (J.A. 247-249; 693 F.2d at 150-151).

The majority held that the Board was free to redefine the terms "notes" and "securities" in the Act so as not to encompass "prime quality commercial paper, of maturity less than nine months, sold in denominations of over $100,000, to financially sophisticated customers rather than to the general public" (J.A. 249; 693 F.2d at 151). Significantly, however, the majority also held that the Board is free to define commercial paper "of smaller denominations, or issued to the general public" (J.A. 250; 693 F.2d at 151) to be a "note" or "security" under the Act, based solely upon the Board's changing assessment of current economic conditions and competitive business considerations.

2. The Dissent

Senior Circuit Judge Robb dissented, finding that "the majority's holding contravenes the fundamental policy of the Glass-Steagall Act" (J.A. 250; 693 F.2d at 152). Judge Robb rejected the functional analysis invented by the Board and adopted by the majority, noting that it ignores the bank's role as a promoter, which is "[t]he critical distinction between commercial banking and investment banking" (J.A. 251; 693 F.2d at 152).

Judge Robb also rejected the majority's focus on factors such as low default rates and sophistication of investors, pointing out that, by "[r]elying on these factors, a bank could transform 'transactions unquestionably at the heart of the securities industry into permissible activity for commercial depository banks'" (J.A. 252; 693 F.2d at 153). Judge Robb observed that Congress had flatly prohibited bank underwriting of corporate securities "without regard to the likely 'soundness' of the securities which a bank might sell" (J.A. 255; 693 F.2d at 154). As he stressed, the Act "has no provision permitting bank sales of securities which are 'prime quality' or 'very low-risk'" (J.A. 253; 693 F.2d at 153). Judge Robb also found that bank marketing of commercial paper gives rise to precisely the sort of potential abuses and hazards that Congress intended the Glass-Steagall Act to eliminate (J.A. 253-256; 693 F.2d at 153-155).

Finally, Judge Robb disagreed with the majority's attempt to "force a narrow meaning onto the terms of the Act" (J.A. 256; 693 F.2d at 155). In his view, the terms used by Congress —"stocks," "bonds," "debentures," "notes," and "other securities"—are all-encompassing, and were intended to be so.

SUMMARY OF ARGUMENT

1. Faced with overwhelming evidence that the securities activities of commercial banks had precipitated the Stock Market Crash of 1929 and the ensuing Great Depression, Congress enacted the Glass-Steagall Act to exclude depository institutions completely and entirely from the business of underwriting "notes or other securities." Before taking this admittedly drastic step, Congress considered the alternative of permitting banks to continue to engage in the securities business under a system of ongoing federal supervision and *ad hoc* administrative regulation. But, because it determined that the potential hazards that can arise when banks engage in the securities business simply are too subtle and pervasive to control through case-by-case regulation, Congress rejected this alternative in

favor of a broad, flat and self-executing prohibition forbidding banks to underwrite virtually all notes and securities, including commercial paper. Despite repeated efforts by special interest groups over the last fifty years either to repeal the Act or to alter the prohibitory philosophy it embodies, Congress consistently has adhered to its original policy decision.

In upholding the Board's ruling, however, the majority has done what Congress repeatedly has refused to do—it has transformed the Glass-Steagall Act from a prohibitory statute into an *ad hoc* regulatory statute, in direct contravention of Congress' substantive policy choice on the scope of permissible bank securities activities, and in direct conflict with Congress' structural decision as to the manner in which the issue should be resolved by the federal government. Holding that the Board and the other federal banking regulators are empowered to "adapt" the Glass-Steagall Act to their own subjective notions of "current business reality" and the "changing financial needs of our economy," the majority approved the Board's decision to exclude commercial paper from the scope of the Act's flat prohibition and to regulate the resulting dangers through administrative regulations or guidelines. In doing so, the majority not only contravened Congress' unambiguous intent, but impermissibly conferred upon the federal banking regulators virtually unbounded legislative power to restructure the statutory framework governing the nation's financial services industry.

The consequences of this usurpation of legislative authority have been confusion and disruption. In exercising their new found legislative authority, the banking regulators have interfered with and pre-empted an ongoing legislative process, have forced the SEC to reverse its longstanding interpretation of the securities laws in an attempt to cure the resulting regulatory imbalance, and have provoked a torrent of litigation. Because the majority opinion cannot be squared with the language of the Act, the Congressional intent underlying the Glass-Steagall Act, or the separation-of-powers principles embodied in the Constitution, the statutory interpretation it espouses should be reversed.

2. In transforming the Glass-Steagall Act into a regulatory statute, and in extending extreme and undue judicial deference to the Board's "adaptation" of the Act, the majority below abdicated its duty to construe the language of the Glass-Steagall Act. The issue in this case is not whether, in light of a broad Congressional mandate, the Board reasonably exercised delegated regulatory authority in permitting banks to underwrite commercial paper. The issue here is whether commercial paper constitutes "notes or other securities" within the meaning of the flat Congressional prohibition embodied in Sections 16 and 21 of the Glass-Steagall Act—a pure question of statutory construction, which, under Article III of the Constitution and the Administrative Procedure Act, is a matter to be decided by the judiciary. Resolution of this issue turns not upon the Board's expert knowledge of commercial banking, but upon the language and legislative history of the Glass-Steagall Act and upon judicial application of the canons of statutory construction. Because the Board's ruling contravenes the plain language and legislative purpose of the Act, as well as established principles of statutory interpretation, the Board's ruling is not entitled to judicial deference.

3. Sections 16 and 21 of the Glass-Steagall Act flatly prohibit commercial banks from underwriting commercial paper "notes" and "securities." This Court repeatedly has instructed that the terms of Sections 16 and 21 are to be construed broadly and applied literally. As the Board and majority below conceded, application of these principles plainly demonstrates that commercial paper is both a "note" and a "security."

4. The legislative history surrounding the enactment of the Glass-Steagall Act confirms the plain statutory language. Throughout the Glass-Steagall Act, and other contemporaneous legislation enacted in response to the economic crisis of the 1930's, is an express Congressional intent that the words "notes" and "securities" are to encompass commercial paper. Indeed, in those instances where Congress wished to exclude commercial paper from the reach of specific portions of these statutes, Congress itself provided exclusions through express statutory language. Here, Congress did not except commercial

paper "notes" and "securities" from the flat prohibition of the Glass-Steagall Act, either expressly or indirectly. Indeed, the statutory language, structure, and purpose plainly evidence the fact that Congress intended the Act to apply to all notes and securities, regardless of risk, and to apply to commercial paper.

5. For these reasons, the "functional analysis" followed by the Board and adopted by the majority has no place in construing the Glass-Steagall Act, a prohibitory statute which does not provide for case-by-case administrative regulation. Proper application of a functional analysis, however, confirms that commercial paper falls within the scope of the Act's flat prohibition. When a bank markets commercial paper, it is not functioning as a commercial banker by extending commercial loans, but is functioning as an investment banker by promoting the sale of a third party's notes to investors. This is precisely the activity Congress sought to prohibit in enacting the Glass-Steagall Act.

ARGUMENT

I. THE MAJORITY OPINION BELOW IMPROPERLY TRANSFORMS THE GLASS-STEAGALL ACT FROM A SELF-EXECUTING, FLATLY PROHIBITORY STATUTE INTO A STATUTE AUTHORIZING *AD HOC*, CASE-BY-CASE ADMINISTRATIVE REGULATION

A. The Glass-Steagall Act Flatly Prohibits Banks From Underwriting Corporate "Notes or Other Securities"

The Glass-Steagall Act embodies Congress' considered legislative judgment that it was necessary to "separat[e] as completely as possible commercial from investment banking." *Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. 46, 70 (1981) ("*Board of Governors*"). To achieve this goal, Section 16 of the Glass-Steagall Act unequivocally and directly prohibits commercial banks from "underwriting *any* issue of securities or stock" (emphasis supplied).

Section 21 of the Act, in turn, unambiguously and directly prohibits any firm "engaged in the business of * * * underwriting, selling, or distributing * * * stocks, bonds, debentures, notes, or other securities" from "engag[ing] at the same time *to any extent whatever* in the business of receiving deposits * * *" (emphasis supplied). As this Court has observed, "Sections 16 and 21 *flatly prohibit* banks from engaging in the [securities] underwriting business." *Board of Governors, supra*, 450 U.S. at 58 n. 24 (emphasis supplied).[6]

Congress took the drastic step of enacting a "flat prohibition" deliberately. Following the stock market crash and Congressional hearings in which the involvement of banks in securities activities was detailed, Congress considered permitting commercial banks to engage in the securities business under a system of ongoing federal supervision and *ad hoc* administrative regulation.[7] Congress determined, however, that the conflicts of interests, financial dangers and other potential abuses that arise when banks engage in the securities business are "so subtle as not to be easily recognized,"[8] rendering them impervious to case-by-case regulatory control.

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[6] Over the years, Congress has adopted a few limited exceptions to the Act's flat prohibition. But, when Congress has intended exceptions, Congress *itself* has carefully and expressly authorized the activities in question, rather than leaving the matter to any regulatory body. Thus, in 1933, Congress specifically excepted certain governmental securities from the scope of Section 16's underwriting bar. *See* 48 Stat. 162. Similarly, in 1935, Congress amended Section 21 to except mortgage notes from its reach. *See* 49 Stat. 707. And, on several occasions, Congress has amended Section 16 to allow banks to underwrite a variety of "stocks, bonds, debentures, notes or other securities" issued or guaranteed by federal regulatory agencies. *See, e.g.*, 48 Stat. 162.

[7] *See, e.g.*, H. Willis & J. Chapman, *The Banking Situation* 67-69 (1934); W. Peach, *The Securities Affiliates of National Banks* 143-148 (reprinted ed. 1975); *see generally*, 75 Cong. Rec. 9882 (1932) (remarks of Sen. Glass) (explaining difference of opinion in the committee over regulation versus complete separation).

[8] 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley); *see also, Investment Company Institute* v. *Camp*, 401 U.S. 617, 630 (1971) ("*Camp*") (Congress "repeatedly focused on the more subtle hazards that arise when a commercial bank * * * enters the investment banking business").

and are so fundamentally incompatible with the business of commercial banking as to necessitate the prophylactic remedy of absolute prohibition.[9]

As a result, Congress decided to separate investment and commercial banking "completely" and "entirely," *Board of Governors, supra,* 450 U.S. at 62, notwithstanding the potential costs of this policy, and notwithstanding the increasing popularity, in that era, of delegating broad regulatory discretion to administrative agencies.[10] Thus, as this Court has observed, the Glass-Steagall Act represents Congress' considered legislative judgment that

> policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business [are] outweighed by the "hazards" and "financial dangers" that arise when commercial banks engage in the activities proscribed by the Act.

Camp, supra, 401 U.S. at 630.[11]

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[9] *See, e.g.,* 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley) (mere existence of bank securities operation "no matter how carefully and conservatively run is inconsistent with the best interests of the bank as a whole"); *Camp, supra,* 401 U.S. at 634 (Congress concluded that "the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities [are] destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system").

[10] *See also,* 76 Cong. Rec. 1940 (1933) (remarks of President Roosevelt) ("Investment banking is a legitimate business. Commercial banking is another wholly separate and distinct legitimate business. Their consolidation and mingling is contrary to public policy. I propose their separation"). *Accord,* S. Rep. No. 1455, 73d Cong., 2d Sess. 185 (1934).

[11] The history of Section 21 in particular reveals the strength of Congress' commitment to the Act's flat prohibition. As originally reported from Committee, Section 21 only prohibited those entities "principally engaged" in underwriting securities from accepting deposits. During floor debate on the bill, the Senate approved an amendment striking the word "principally," "in order to make sure that we will accomplish a [complete] separation of

(footnote continues)

Congress has adhered to that judgment ever since, and steadfastly has refused to substitute transitory administrative regulation for flat statutory prohibition. Thus, in 1935, Congress refused to amend the Act to permit "national banks, *under regulation* by the Comptroller of the Currency, to underwrite and sell bonds, debentures, and notes."[12] And, as recently as 1980, Congress extended to the Comptroller of the Currency authority to issue such rules as were needed to "carry out the responsibilities of the office," 12 U.S.C. § 93a, but expressly continued to withhold from the Comptroller the authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'" *Id.*

The basic policy decision Congress made in enacting the Glass-Steagall Act—a policy decision regarding both the level of government at which, and the substantive form in which, the separation of investment and commercial banking would be addressed—contrasts sharply with the Congressional policy decision embodied in the Bank Holding Company Act, 12 U.S.C. §§ 1841, *et seq.* In the Bank Holding Company Act, Congress deliberately created a regulatory regime, expressly vesting in the Board the power to define and to authorize bank holding companies and their non-bank subsidiaries to undertake those activities the Board properly finds, on a case-by-case basis, to be "so closely related to banking * * * as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).

As this Court has observed, Congress intended Section 4(c)(8) of the Bank Holding Company Act to confer upon the

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(footnote continued)

investment and deposit banking." *See* 77 Cong. Rec. 4180 (1933) (remarks of Sen. Bulkley). The Senate also considered an amendment to Section 21 designed to permit investment bankers, under limited circumstances, to accept savings deposits. At the urging of Senators Glass and Bulkley, however, the Senate defeated this proposal in order to preserve the Act's "absolute prohibition." *See* 77 Cong. Rec. 4149 (1933).

[12] *See* H.R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. 53 (1935) (emphasis supplied); *see also*, S. Rep. No. 1007, 74th Cong., 1st Sess. 16 (1935); 79 Cong. Rec. 13,706 (1935) (remarks of Rep. Steagall); 79 Cong. Rec. 11,934-11,935 (1935) (remarks of Sen. LaFollette).

Board "flexibility * * * to determine the activities in which a bank holding company and its [non-bank] subsidiaries may engage." *Board of Governors, supra*, 450 U.S. at 57 n. 23 (quoting 116 Cong. Rec. 42,432 (1970)). Congress inserted no comparable delegation of discretionary authority in the Glass-Steagall Act.

Congress' deliberate insistence upon the maintenance of the broad scope of the Act's flat prohibition has been as adamant as its refusal to replace the prohibition with a scheme of administrative regulation. Thus, as explained above (*see* p. *14, supra*), Congress refused in 1935 to grant national banks the precise power the Board purported to grant here—the power to underwrite bonds, debentures, and notes. In 1938, Congress also refused even to report out of committee legislation which would have permitted banks to "underwrite or participate in the underwriting of new issues of such securities as [they] might otherwise lawfully purchase for [their] own account." *See* H.R. 9441, 75th Cong., 3d Sess. (1938); 83 Cong. Rec. 1809 (1938). And, Congress consistently has refused to amend the Act in order to permit banks to engage in a variety of related securities activities.[13]

Despite the current clamor to make wholesale changes in the scope of the Act's prohibitions, Congress has been equally adamant in recent years. For example, during each of its last three terms, Congress considered major legislative proposals which would have materially altered the substantive restrictions of the Glass-Steagall Act. Although Congress enacted major reforms to other federal banking laws in each of those terms,[14]

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[13] *See, e.g.*, H.R. Rep. No. 1631, 91st Cong., 2d Sess. 28-29 (1970) (defeat of bills authorizing banks to underwrite shares in bank mutual funds); S. Rep. No. 184, 91st Cong., 1st Sess. 10-12, 22-28 (1969); S. Rep. No. 1351, 90th Cong., 2d Sess. 9-11, 19-26 (1968); *Hearings on S. 1933 and S. 2474 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 93rd Cong., 2d Sess. 6, 136 (1974) (noting revenue bond legislation introduced and defeated in 1935, 1938, 1945, 1955, 1957, 1962, 1963, 1965, 1967, 1973, and 1975).

[14] *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

Congress in each instance refused to modify the scope of the Glass-Steagall Act restrictions in the slightest.[15]

This history vividly illustrates the serious legal infirmity in the majority's interpretation of the Glass-Steagall Act. This Court has instructed that the judiciary must not "give a reading to [a statute] that Congress considered and rejected." *Pacific Gas & Elec. Co.* v. *State Energy Resources Commission*, 103 S. Ct. 1713, 1730 (1983). *See also, Baldridge* v. *Shapiro*, 455 U.S. 345, 358 (1982). Yet, by transforming the Glass-Steagall Act into a regulatory statute, and by authorizing the Board to "adapt" the Act's terms on a "case-by-case basis" to the *Board's* view of "current business reality" and "the changing financial needs of our economy," the majority has overridden Congress' substantive and structural policy decisions, and improperly has "enacted" the very statute Congress consistently has refused to enact for fifty years.[16]

B. The Interrelated Statutory Scheme Congress Created To Govern The Securities And Banking Industries Confirms That The Glass-Steagall Act Constitutes A Flat Prohibition

The effect of the majority's opinion was to delegate Article I legislative power to the Board, and to invite the Board to exercise that power by adapting the Glass-Steagall Act to the *Board's* changing assessment of current economic conditions and competitive business considerations. The federal banking regulators, in turn, have willingly accepted the majority's invitation, and, within the past year alone, have authorized

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[15] *Compare, e.g.*, S. 1720, 97th Cong., 1st Sess. (1981) (proposing authority for banks to underwrite revenue bonds and mutual funds) *with* Pub. L. No. 97-320, 96 Stat. 1469 (1982) (containing no such authority). *See also, Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 97th Cong., 2d Sess. 6-10 (1982) (testimony of Hon. Donald T. Regan, Secretary of the Treasury).

[16] *See, e.g., Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 732 (1975).

banks to commence, for the first time since the Glass-Steagall Act was adopted fifty years ago, activities previously understood to be barred to banks.[17]

Apart from the deluge of litigation that this administrative exercise of legislative authority has generated,[18] and that it will continue to spawn if the majority opinion were affirmed,[19] the opinion below also has had palpable effects upon the carefully

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[17] *See, e.g., Decision of the Comptroller of the Currency Concerning an Application by American National Bank of Austin, Texas, to Establish an Operating Subsidiary to Provide Investment Advice* (September 6, 1983) (combination of investment advice and brokerage business); *BankAmerica Corp. (Schwab)*, 69 Fed. Res. Bull. 105 (1983) (public securities brokerage); *Decision of the Comptroller of the Currency on the Application by Citibank to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trusts* (October 28, 1982) (bank operation of mutual funds); *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Non-member Banks*, 47 Fed. Reg. 38,984 (September 3, 1982) (bank underwriting of securities through shell subsidiaries); *Decision of the Comptroller of the Currency on the Application by Security Pacific National Bank to Establish an Operating Subsidiary to be Known as Security Pacific Discount Brokerage Services, Inc.* (August 26, 1982) (public securities brokerage); *Decision of the Federal Home Loan Bank Board on the Service Corporation Application of Coast Federal Savings & Loan Association, Perpetual American Federal Savings & Loan Association and California Savings & Loan Association* (May 6, 1982) (same).

[18] *See, e.g., Investment Company Institute* v. *Conover*, No. 83-0549 (D.D.C. filed Feb. 24, 1983); *Investment Company Institute* v. *United States*, No. 82-2532 (D.D.C. filed Sept. 8, 1982); *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, No. 83-4019 (2d Cir. filed Feb. 3, 1983); *Securities Industry Association* v. *Conover*, No. 82-2865 (D.D.C. filed Oct. 6, 1982); *Securities Industry Association* v. *Federal Home Loan Bank Board*, No. 82-1920 (D.D.C. filed July 12, 1982).

[19] By deliberately structuring the Glass-Steagall Act as a flat prohibition against bank underwriting of all "stocks, bonds, debentures, notes, or other securities," and by then excepting from the reach of the prohibition those limited activities it intended to authorize, Congress eliminated the need for continuous administrative proceedings, followed by continuous judicial review proceedings, to define the scope of permissible bank securities activities. Because the majority opinion eviscerates Congress' structural prohibition in favor of *ad hoc* adaptation and administrative regulation, however, affirmance of the majority opinion would *institutionalize* litigation as the key determinant of permissible bank securities activities, particularly since the banking regulators will be forced to "adapt" their "adaptations" of the statute to constantly changing business conditions.

balanced and intertwined statutory scheme Congress legislated to govern the securities and banking industries. Thus, for example, because Congress believed that the Glass-Steagall Act flatly foreclosed banks from engaging in the securities business, Congress excepted banks from the definitions of the terms "broker" and "dealer" in the Securities Exchange Act of 1934.[20] These exclusions, of course, place banks outside the comprehensive regulatory scheme Congress created to protect investors, to govern the nation's securities markets, and to vest in the SEC "reasonably complete and effective control" over the participants in those markets. 15 U.S.C. § 78b.

Because of the recent rulings of the federal banking regulators, however, the SEC has deemed it necessary to attempt itself to realign the statutory structure by removing the statutory exception for banks from SEC jurisdiction that Congress wrote into the statute.[21] Such a requirement, deemed necessary by the SEC to protect investors who purchase their securities and notes from banks instead of securities brokers and dealers, will surely spawn additional litigation by banks, and has produced an unseemly confrontation between the SEC and various banking regulators.[22]

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[20] *See, e.g., Hearings on H.R. 7852 and H.R. 8720 before House Comm. on Interstate & Foreign Commerce*, 73d Cong., 2d Sess. 86 (1934) (Testimony of Thomas G. Corcoran) ("[U]nder the Glass-Steagall bill [, banks] cannot go into a business of dealing in securities"). *See also*, H.R. Rep. No. 123, 94th Cong., 1st Sess. 93 (1975) ("Since 1934, banks have been excluded from the definition of 'broker' and 'dealer' under the Securities Exchange Act. * * * the Glass-Steagall Act had effectively removed banks from the securities business").

[21] *See* 48 Fed. Reg. 51,930 (November 15, 1983). ("This action is prompted by investor protection *and other regulatory concerns raised by the recent expansion of bank securities activities*") (emphasis supplied).

[22] *See Banks' Stock Business Controls Voted by SEC*, The Washington Post, October 28, 1983 at D.10; *SEC To Propose Registering Banks That Solicit Securities Business*, 15 BNA Sec. Reg. L. Rep. 1995 (October 28, 1983); *SEC Rush on Turf Ruffled Regulators at Bank Agencies*, Legal Times, November 14, 1983 at 1.

In short, the banking regulators' exercise of their newfound authority to "adapt" the Glass-Steagall Act has triggered a veritable flood of additional revisionist regulatory activity, inflicting serious damage upon the fabric of the law. Congress' decision to separate the securities and banking industries has been disregarded. The carefully balanced and integrated statutory scheme Congress created to govern the industries it had separated has been replaced with a patchwork regulatory quilt of uncertain and constantly varying shape, and of growing size. The results have been increased litigation, business uncertainty and administrative disarray.

These costs are all perhaps part of the price that must be paid when Congress, in the exercise of its Article I powers, *deliberately* delegates to an administrative agency the authority to regulate, on a case-by-case basis, a problem that Congress itself has determined to be too fluid, too complex, or too broad-ranging to resolve through comprehensive yet specific legislation. *See, e.g.*, R. Stewart, *Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1695-1696 (1975). The Glass-Steagall Act, however, is not a statute in which Congress has delegated a problem, along with Congress' legislative authority, to the headless "fourth branch of * * * [g]overnment" for resolution. *INS* v. *Chadha*, 103 S. Ct. 2764, 2801 (1983) (White J., dissenting). In enacting the Glass-Steagall Act, Congress itself surveyed the problems presented by banks' securities activities, considered the potential benefits of a regulatory approach, and deliberately rejected that approach in favor of a broad and flat prohibition. Under such circumstances, it was completely at odds with our system of government for the majority to disregard Congress' legislative solution and to substitute in its place, along with all the attendant costs, the majority's own gratuitous contribution to the "modern administrative state." *Id.* at 2810.

When all is said and done, the fact remains that no administrative agency possesses the inherent power to "adapt" a statute to its subjective notions of "the changing financial

needs of our economy," and no court has the authority to vest such power in an agency.[23] Even if an agency deems a statute to be outdated, anachronistic, or unwise, its duty, under our system of government, is to enforce the statute unless and until it is repealed by Congress:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. * * * [I]t is * * * the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. *Once Congress * * * has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.*

TVA v. *Hill*, 437 U.S. 153, 194 (1978) (emphasis supplied). *See also, Office Employees International Union* v. *NLRB*, 353 U.S. 313, 319 (1957). Because the majority opinion is unfaithful to these principles, the statutory interpretation it espouses should be reversed.

II. THE MAJORITY OPINION BELOW IMPROPERLY AUTHORIZES BANKS TO UNDERWRITE COMMERCIAL PAPER "NOTES" AND "SECURITIES"

A. The Majority Below Abdicated Its Duty To Construe The Language Of The Glass-Steagall Act

That the majority improperly has transformed the Glass-Steagall Act into a regulatory statute is evidenced by the standard of review it applied. The majority held that it was not required to determine what Congress intended when it enacted

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[23] Because Congress indisputably has not delegated such power to the Board, there is no need for this Court to consider the serious constitutional issues that would be presented by such a wholly open-ended and amorphous delegation. *See, e.g., Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 671-688 (1980) (Rehnquist, J., concurring in the judgment); *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 543-548 (1981) (Rehnquist, J. and Burger, C.J., dissenting).

the Glass-Steagall Act and was not empowered to determine whether the Board had correctly interpreted the Act, but rather was restricted to ascertaining whether the Board's ruling somehow was " 'sufficiently reasonable' to be accepted by a reviewing court" (J.A. 227; 693 F.2d at 140) (emphasis omitted). As its rationale for this standard of review, the majority stated that the Board, and not the Congress, is best suited to "formulate national banking policy" under the Act, in the light of the Board's "broad rulemaking * * * powers" and its "expert knowledge" of the commercial banking industry (J.A. 227; 693 F.2d at 140) (emphasis omitted).

Contrary to the majority opinion, however, the issue in this case is not whether the Board reasonably exercised delegated regulatory authority in permitting banks to underwrite commercial paper, or which branch of government is best suited to formulate national banking policy. The issue is whether *Congress*—the branch that already and properly has formulated that policy—intended to prohibit banks from underwriting commercial paper when it forbade them to underwrite "notes or other securities." As the district court recognized (J.A. 208; 519 F. Supp at 611), this issue presents a pure question of statutory construction which, under Article III of the Constitution[24] and the Administrative Procedure Act,[25] is entrusted to the judiciary for resolution.

As a result, the Board's nonexistent rulemaking powers under the Act,[26] and its "expert knowledge" of commercial

[24] *See, e.g., Marbury* v. *Madison*, 5 U.S. 137, 177 (1803); *United States* v. *Nixon*, 418 U.S. 683, 705 (1973).

[25] The Administrative Procedure Act directs that the *court* shall "decide all relevant questions of law, interpret constitutional and statutory provisions" and "hold unlawful and set aside agency action * * * not in accordance with the law." 5 U.S.C. § 706.

[26] The Board's "rulemaking" power to which the majority mistakenly referred is found in *other* banking statutes, *see* 12 U.S.C. § 1843(c)(8), but *not* in the Glass-Steagall Act (J.A. 227; 693 F.2d at 140). The majority was unable to cite any grant of rule-making power to the Board in the Glass-Steagall Act because Congress repeatedly has refused to grant such rulemaking power. *See* pp. 12-14, *supra*.

banking, simply have no relevance here. Rather, because the instant controversy

> relates to the meaning of * * * statutory term[s], the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [Board], but by judicial application of canons of statutory construction.

Barlow v. *Collins*, 397 U.S. 159, 166 (1970) (citing *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-270 (1960)). In this area, it is the courts, and not administrative agencies, which are the "expert[s]." *Barlow* v. *Collins*, *supra*, 397 U.S. at 166 (quoting *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting)).[27]

To be sure, courts generally will extend judicial deference to a reasonable interpretation of a statute propounded by an agency entrusted with the statute's administration. *See Camp*, *supra*, 401 U.S. at 426-427. Here, however, there is no such regime because the Glass-Steagall Act is a self-enforcing criminal statute. Moreover, even if the principal of judicial deference has any relevance here, it "only sets 'the framework for judicial analysis; it does not displace it.'" *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973)). Within this

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[27] In deferring to the Board's expert knowledge of commercial banking, the majority erroneously relied heavily upon Justice Rutledge's concurring opinion in *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441, 450-451 (1947) (Rutledge, J., concurring) ("*Agnew*"). In *Agnew*, seven members of this Court expressly rejected the extremely deferential standard of review proposed by Justice Rutledge, stressing that it is the judiciary's obligation to construe the Act's flat prohibition. *See Agnew*, *supra*, 329 U.S. at 449. And, this Court has rejected Justice Rutledge's standard of review in subsequent cases construing the Glass-Steagall Act. *See Camp*, *supra*, 401 U.S. at 426-427.

In contrast, this Court has cited Justice Rutledge's concurrence in defining the standard of review applicable *under the Bank Holding Company Act*. *See Board of Governors*, *supra*, 450 U.S. at 56 n. 21. But, the Bank Holding Company Act, unlike the Glass-Steagall Act, is a regulatory statute, and the Board's knowledge of commercial banking is relevant in discerning, under Section 4(c)(8) of the Bank Holding Company Act, those activities that are "closely related to banking." The same plainly is not true in determining whether Congress intended the phrase "notes or other securities" to encompass commercial paper.

framework, the courts are obliged strictly to scrutinize the agency's interpretation,[28] and to reject the interpretation when it clashes with the plain language,[29] legislative history,[30] or purpose of the statute.[31] As this Court recently reaffirmed:

> [T]he courts are the final authorities on issues of statutory construction. They *must* reject administrative constructions of the statute, whether reached by adjudication or by rule-making that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

FEC v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (emphasis supplied). *Cf. Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866-2867 (1983).[32]

In transforming the Glass-Steagall Act from a prohibitory into a regulatory statute, the majority failed to adhere to these principles. Rather than recognizing its "obligation to honor the clear meaning of the statute, as revealed by its language, purposes, and history," *International Brotherhood of Teamsters* v. *Daniel, supra*, 439 U.S. at 556 n. 20, the majority abdicated its responsibility and extended unprecedented judicial deference to the Board's "adaptation" of the Glass-Steagall Act.

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[28] *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

[29] *See, e.g., SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978).

[30] *See, e.g., FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 736-744 (1973).

[31] *See, e.g., Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974).

[32] The majority's reliance upon the *Democratic Senatorial Campaign Committee* case in adopting its standard of review is further evidence of the majority's transformation of the Glass-Steagall Act into a regulatory statute. In that case, this Court upheld a regulation promulgated under the Federal Election Campaign Act of 1971 because the regulation contravened neither the language nor the purpose of the statute, and because Congress had vested in the Federal Election Commission the power to "formulate general policy" under the Act through "extensive rulemaking * * * powers." *FEC* v. *Democratic Senatorial Campaign Committee, supra*, 454 U.S. at 37. Congress, of course, expressly has declined to vest such regulatory authority in the Board under the Glass-Steagall Act. And, as demonstrated below, the Board's ruling contravenes *both* the plain language and purpose of the Glass-Steagall Act.

In doing so, the majority also improperly permitted the Board to arrogate to itself a policy decision of enormous economic and legal significance, notwithstanding this Court's warning that:

> [t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.

American Ship Building Co. v. *NLRB*, 380 U.S. 300, 318 (1965); *Cf. Office Employees International Union* v. *NLRB*, *supra*, 353 U.S. at 319; *SEC v. Sloan*, *supra*, 436 U.S. at 118-122.

In sum, the sole, narrow question before the majority was whether Congress intended the flat prohibition of the Glass-Steagall Act to encompass commercial paper. As demonstrated below, the plain language, legislative history, and structure of the statute establish plainly that it did. As a result, talk of deference to the Board's contrary ruling simply is "pointless." *FEC* v. *Democratic Senatorial Campaign Committee*, *supra*, 454 U.S. at 31.

B. Commercial Paper Is A Note or Other Security Under The Plain Statutory Language

Section 16 of the Glass-Steagall Act flatly prohibits banks from underwriting any issue of "securities or stock." In parallel fashion, Section 21 of the Act flatly prohibits any entity engaged in the underwriting of "stocks, bonds, debentures, notes, or other securities" from simultaneously accepting deposits. Because the reach of Sections 16 and 21 are coextensive,[33] the issue before this Court, simply stated, is whether Congress intended the phrase "notes or other securities" to encompass commercial paper.

The principles governing the resolution of this issue are equally simple and well-settled. As this Court recently explained:

> [I]n all cases involving statutory construction, "our starting point must be the language employed by

[33] *See Board of Governors*, *supra*, 450 U.S. at 63. *See also*, (J.A. 212; 519 F. Supp. at 613).

> Congress," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

American Tobacco Co. v. *Patterson*, 456 U.S. 63, 68 (1982).

These principles apply with special force in interpreting the Glass-Steagall Act, where this Court has directed that the "literal terms" of the Act are to be applied "as they were written." *Camp, supra*, 401 U.S. at 639. Indeed, this Court only recently has reiterated that the courts must "rely[ ] squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act." *Board of Governors, supra*, 450 U.S. at 65.

Application of these principles establishes that commercial paper falls squarely within the Act's flat prohibition. Sections 16 and 21 forbid banks to underwrite "notes or other securities." It is beyond dispute, as even the Board[34] and the majority below[35] concede, that commercial paper constitutes "notes." Indeed, this concession is mandated not only by the numerous explicit references in the banking statutes to commercial paper as "notes" and to "notes" as commercial paper,[36] but also by the express statements of the drafters of the Glass-Steagall Act.[37]

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[34] ("[C]ommercial paper * * * consists of unsecured promissory *notes*") (J.A. 131) (emphasis supplied); ("While the words in statutes should generally be interpreted in light of their ordinary meaning, it is clear for a number of reasons that the term 'notes' as used in Section 21 should not be interpreted according to its literal sense") (J.A. 131).

[35] (J.A. 233; 693 F.2d at 143).

[36] *See, e.g.*, 12 U.S.C. § 84 (exempting from limitations on the amount of money a national bank can lend to any one person obligations as indorser or guarantor of *notes, other than commercial or business paper*).

[37] *See, e.g.*, 75 Cong. Rec. 9904 (1932) (remarks of Sen. Walcott) (decrying the pre-panic practice in which business deviated from "borrowing at the commercial banks upon their commercial paper—that is upon their *notes*") (emphasis supplied).

Commercial paper also is a "security" under the plain language of the Glass-Steagall Act. Sections 16 and 21 prohibit banks from underwriting "stocks, bonds, debentures, notes, *or other securities*" (emphasis supplied). As Judge Robb (J.A. 256-257; 693 F.2d at 155) and the district court (J.A. 212; 519 F. Supp. at 613) held, the juxtaposition of the terms "notes" and "*other* securities" demonstrates that commercial paper "notes" are included within the generic definition of the broader term "securities." Indeed, were this not so, the word "other" in the phrase "other securities" impermissibly would be rendered superfluous.[38] In short,

> [T]here is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading of the word "securities". To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt.

Camp, supra, 401 U.S. at 635.

The majority below took a radically different approach to the statutory language in order to exclude commercial paper from its reach. Rather than construing the language broadly and applying it literally, as this Court has instructed, the majority determined that the statute should be given a "narrower meaning" than that expressed by its plain language (J.A. 235; 693 F.2d at 144).

The majority reasoned that, because "stocks," "bonds," and "debentures" allegedly all are instruments issued "to raise money for an extended period of time as part of a corporation's capital structure," Congress must have intended the term "notes" to include only similar types of notes. Thus, the majority deleted the term "notes" from the statute and replaced it with the heretofore unknown term "investment notes" (J.A. 234; 693 F.2d at 143) or, stated differently, notes issued "to

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[38] *See, e.g., Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used"). *Accord, Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Weinberger* v. *Hynson, Wescott and Dunning, Inc.*, 412 U.S. 609, 633 (1973); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); C. Sands, *Sutherland's Statutory Construction* § 46.06 (3d ed. 1973).

raise money available for an extended period of time as part of a corporation's capital structure" (J.A. 239; 693 F.2d at 143). And, because the majority found commercial paper to fall outside the rewritten statutory language, the majority concluded that the Glass-Steagall Act does not apply to commercial paper.

The majority's narrow construction of the statutory language, however, does not withstand analysis. Congress long has been aware of the distinctions between various types of notes, and has qualified the term "notes" when it has deemed use of a qualifier appropriate.[39] Section 21, however, contains no adjectives and draws no distinctions; it refers simply and comprehensively to *all "notes."*[40]

Moreover, Congress' own actions demonstrate that Congress intended the term "notes" in Section 21 to have its plain and ordinary meaning. When Congress decided, in 1935, to exclude "mortgage notes" from the coverage of Section 21, Congress itself amended the statutory language in order to do so.[41] This amendment would have been unnecessary and

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[39] Thus, Section 16 of the Glass-Steagall Act (12 U.S.C. § 24 (Seventh)) refers to "notes • • • commonly known as investment securities"; Section 9 of the Federal Reserve Act (12 U.S.C. § 320) refers to "capital notes"; and Section 13 of the Federal Reserve Act describes "national bank notes," "Federal Reserve Notes," and "maturing notes" (12 U.S.C. § 342), while distinguishing between "notes • • • issued or drawn for agricultural, industrial, or commercial purposes" and "notes • • • covering merely investments" (12 U.S.C. § 343).

[40] The majority's attempt to create a distinction between bonds and debentures on the one hand, and commercial paper on the other, does not square with economic reality. "Bonds" and "debentures" never have been used solely as long-term capital raising instruments, either now or in 1933. (The Supplemental Appendix to this brief contains, for the Court's convenience, several tombstones for bonds and debentures with maturities of nine months or less, from both the period in which the Glass-Steagall Act was enacted (1930-1935) and from the present). Conversely, commercial paper often is used as a long-term capital raising device. *See, e.g.*, J.W. Hicks, *Commercial Paper: An Exempted Security Under Section 3(a)(3) of the Securities Act of 1933*, 24 U.C.L.A. L. Rev. 227, 281-292 (1976); K. Handal, *The Commercial Paper Market and the Securities Act*, 39 U. Chi. L.Rev. 362, 389 (1972).

[41] *See* 49 Stat. 707.

superfluous if, as the majority stated, Congress intended the term "notes" to mean only "notes issued to raise money over an extended period of time as part of a corporation's capital structure." And, while Congress enacted an exception for mortgage notes, Congress never has enacted an exception for commercial paper notes.[42]

More fundamental, however, is the complete lack of any evidence that Congress intended the majority's construction of the statutory language to apply. The terms "investment notes" and "notes issued to raise money over an extended period of time as part of a corporation's capital structure" appear nowhere on the face of the Glass-Steagall Act and nowhere in its legislative history.[43] They also bear little resemblance to the term Congress actually used to express its will—"notes." As a result, the majority was obligated to explain why Congress intended "that the letter of the statute is not to prevail."[44] This the majority failed to do.[45]

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[42] Where Congress has provided express exceptions, the courts, of course, will not imply or read other exceptions into the statute. *See, e.g., Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980); *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1951).

[43] The majority's analysis does not even support its own conclusion that the Act's prohibition applies only to "capital-raising" notes. As noted above (*see* p. 7, *supra*), the majority limited its holding to commercial paper with certain characteristics. But, these characteristics have no relationship to whether the notes are capital-raising.

[44] *See, e.g., Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *TVA* v. *Hill*, *supra*, 437 U.S. at 187 n. 33. *See also, Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981).

[45] The majority argued that, because Section 16 permits banks to "discount and negotiate promissory notes," the Glass-Steagall Act does not forbid banks to underwrite all "notes" (J.A. 233). Section 16's authorization to "discount" and "negotiate" notes, however, does not empower banks to "underwrite" notes. *See, e.g., Weckler* v. *First National Bank*, 42 Md. 581, 592 (1875); *First National Bank* v. *The National Exchange Bank*, 92 U.S. 679, 681 (1876) (Section 16 does not authorize banks to "engag[e] in the ordinary business of buying and selling [notes] for profit"). In fact, the authorization in Section 16 to discount and negotiate promissory notes derives from Section 8 of the National Bank Act of 1864, 13 Stat. 101, and is merely the source of commercial banks' power to perform the traditional banking

(footnote continues)

The majority's failure to enforce the plain statutory language accordingly can be understood only as a disagreement with the Congressional policy it embodies. But, Congress enacted a broad and flat prohibition, and the courts are bound to enforce the prohibition according to its terms. As Judge Robb succinctly put it:

> The terms "stocks," "bonds," "debentures," and "notes" have broad meanings which encompass a multitude of different instruments. The term "other securities" further indicates the breadth of the Act's coverage; it catches any instruments which are not otherwise defined by the prior four terms. Taken as a group these five terms cover the spectrum of instruments which a corporation might seek to market. Relying "squarely on the language * * * of the Glass-Steagall Act," *Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. at 65, * * * commercial paper is a type of instrument with which the Act is concerned.

(J.A. 256-257; 693 F.2d at 155).

C. The Legislative History Surrounding the Glass-Steagall Act Demonstrates that Congress Intended the Words "Notes" and "Securities" to Encompass Commercial Paper

The legislative history surrounding the enactment of the Glass-Steagall Act confirms that Congress intended the words "notes" and "securities" to encompass commercial paper. In response to the stock market crash of 1929 and the ensuing

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(footnote continued)

function of *purchasing* commercial paper by means of "discount." *National Bank* v. *Johnson*, 104 U.S. 271, 277 (1881); *see First National Bank* v. *Hartford*, 273 U.S. 548, 599 (1927); *Steward* v. *Atlantic National Bank*, 27 F.2d 224, 228 (9th Cir. 1928).

The majority also argued that the term "notes" could not mean "notes" because the Glass-Steagall Act then would prohibit banks from having any connection with banker's acceptances, certificates of deposit, or loan participation notes (J.A. 235, n. 48; 693 F.2d at 144, n. 48). The Act, however, does not prohibit banks from having "any connection with" notes; it prohibits them from "engaging in the business" of "underwriting" notes. *See* 12 U.S.C. §§ 24 (Seventh), 378(a)(1).

Great Depression, Congress enacted several pieces of legislation to restore public confidence in the nation's financial markets—the Banking Act of 1933 (the Glass-Steagall Act), the Securities Act of 1933, the Securities Exchange Act of 1934, the Banking Act of 1935, and the Public Utility Holding Company Act of 1935. Throughout these statutes, Congress expressly reflected its awareness that, unless modified, the use of the terms "notes" and "securities" would encompass commercial paper. In each of those cases where Congress intended to exclude commercial paper from the coverage of the statute (or portions thereof), Congress took action to provide exceptions. It never did so under the Glass-Steagall Act.

The Securities Act of 1933, for example, enacted into law just twenty days *before* the Glass-Steagall Act, defines the term "security" to include "*any* note." 15 U.S.C. § 77b(1) (emphasis supplied). During the hearings on the Securities Act, Senator Glass expressed dissatisfaction with this definition because it plainly encompassed commercial paper. Accordingly, he proposed, with the support of the Board, an amendment to the definition of the term "security" which would have expressly excluded commercial paper from its scope.[46]

Congress refused to adopt the proposed amendment. Instead, it chose merely to exempt some forms of commercial paper from the *registration* requirements of the Act,[47] preserving the status of all commercial paper as "securities," and preserving the application of the Act's *antifraud* provisions to all commercial paper "securities."[48] When the same committees of the same Congress considered the legislation that would become the Glass-Steagall Act, however, no one, including Senator Glass and the Board, sought to amend the words "notes" or "securities" to exclude commercial paper

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[46] *See Hearings on H.R. 4314 before the House Comm. on Interstate & Foreign Commerce*, 73d Cong., 1st Sess. 180-181 (1933); *Hearings on S. 875 before the Senate Comm. on Banking & Currency*, 73d Cong., 1st Sess. 120 (1933).

[47] 15 U.S.C. § 77c(a)(3), 77e.

[48] *See* 15 U.S.C. §§ 77l(c), 77q(c); *see also, Hearings on S. 875 before the Senate Comm. on Banking & Currency*, 73d Cong., 1st Sess. 234 (1933)(remarks of Sen. Adams).

from the class of corporate instruments the Glass-Steagall Act forbids commercial banks to underwrite.

One year later, Congress enacted the Securities Exchange Act of 1934, in which it again defined the term "security" to include "any note." 15 U.S.C. § 78c(a)(10). Because Congress desired to exclude certain types of commercial paper from the definition of the term "security," Congress again recognized that an express exception was necessary to achieve this goal. It accordingly added a provision to the statute expressly excluding certain forms of commercial paper from the Act. 15 U.S.C. § 78c(a)(10).

One year later, Congress enacted the Public Utility Holding Company Act of 1935. The terms of the Act strictly prohibit registered holding companies from acquiring any "securities." 15 U.S.C. § 79b(a)(16). But, because Congress recognized that this language would preclude the purchase of commercial paper, Congress added another provision expressly permitting the acquisition of *"such commercial paper and other securities"* as permitted by the SEC. 15 U.S.C. § 79i(c)(3) (emphasis supplied). As the phrase "and *other* securities" demonstrates, Congress expressly understood commercial paper to be a "security." *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess. 15 (1935).

When Congress enacted the Banking Act of 1935 one business day later, however, it took no such action. Instead, it reaffirmed that, in 1933, it had used the term "notes" in its ordinary and literal sense. Thus, Congress refused to amend the Glass-Steagall Act to permit banks to underwrite bonds, debentures and "notes," but it did amend the Act to remove "mortgage notes" from its coverage. Congress did not amend the statute, however, to exclude commercial paper notes from its reach.[49]

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[49] Indeed, in the Banking Act of 1935, Congress reaffirmed the breadth of the Glass-Steagall Act's flat prohibition by enacting amendments designed to clarify that its restrictions apply to *all* corporate "securities" and not just to corporate "investment securities." As originally enacted, Section 16 provided that the business of dealing in "investment securities" by banks was limited solely to executing buy and sell orders as an accommodation to existing bank customers, *see* 48 Stat. 184-185 (1933); the 1935 amendments replaced the phrase "investment securities" with the broader phrase "securities and stock."

(footnote continues)

This history of Congressional action plainly establishes that Congress intended and understood the words "notes" and "securities" to encompass commercial paper. *See, e.g., Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). *Accord, Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 760 (1980). The majority, however, dismissed this contemporaneous evidence of Congressional intent out of hand. According to the majority, because the securities laws and the Glass-Steagall Act were designed to serve different purposes, the securities laws are "of little * * * relevance" in construing the Glass-Steagall Act (J.A. 241; 693 F.2d at 147).

This statement completely ignores the interrelationship between the securities laws and the Glass-Steagall Act. The securities laws and the Glass-Steagall Act all are part of "the complete regulatory scheme which the Congress enacted to mitigate the problems that the country faced in the 1930's." *Investment Company Institute* v. *Camp*, 274 F. Supp. 624, 642 (D.D.C. 1967), *rev'd*, 420 F.2d 83 (D.C. Cir. 1969), *rev'd*, 401 U.S. 617 (1971). Simply put, the securities laws and the Glass-Steagall Act both are separate pieces of an integrated statutory framework broadly designed to protect the nation's depositors *and* investors.[50]

To bolster its contrary conclusion, the majority relied primarily upon certain selected statements from the legislative history of the Glass-Steagall Act. In these statements, certain legislators complained that, during the preceding decade, banks had been involved with long-term speculative securities (J.A. 236-237; 693 F.2d at 144-145). Based upon these fragments, the majority reasoned that, even though the language of Section 21 plainly covers *all* "stocks, bonds, debentures, notes, or other

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(footnote continued)

See 49 Stat. 684 (1935). Section 16, as originally enacted, also prohibited banks only from underwriting "securities," *see* 48 Stat. 184-185 (1933); the 1935 amendments replaced the word "securities" with the broader phrase "securities or stock." *See* 49 Stat. 684 (1935).

[50] *See* 77 Cong. Rec. 937 (1933) (remarks of President Roosevelt) (Securities Act constitutes "but one step in our broad purpose of protecting investors and depositors"); 77 Cong. Rec. 5896 (1933) (remarks of Sen. Luce) (Glass-Steagall Act's "purpose is, by an extensive revision of our banking laws, to furnish more protection to depositors and investors").

This Court has recognized that the securities laws are relevant in construing the Glass-Steagall Act. In *Camp*, for example, this Court relied exclusively upon the definition of the term "underwriter" found in the Investment Company Act of 1940 to construe the term "underwriting" in Sections 16 and 21 of Glass-Steagall. *See Camp, supra*, 401 U.S. at 622-623; *Board of Governors, supra*, 450 U.S. at 65-66.

securities," Congress intended the Act to apply only to long-term speculative stocks, bonds, debentures, notes, and other securities, and not to commercial paper.

This analysis does not withstand scrutiny. Although bank involvement with speculative securities was one concern of the Congress that enacted the Glass-Steagall Act, it was far from the only, or even the principal, concern. Rather, Congress was concerned primarily with the conflicts of interest and other subtle dangers that arise when commercial banks attempt to act in the dual capacity of commercial and investment banker.[51] As this Court has recognized, Congress believed that the "promotional incentives" of investment banking and the investment banker's "pecuniary stake" in the success of the offerings it underwrites are "destructive of prudent and disinterested commercial banking." *Camp, supra,* 401 U.S. at 634. And, as Congress itself has recognized, the promotional pressures and pecuniary stake of investment banking are present whenever a commercial bank underwrites any issue of "stocks, bonds, debentures, notes or other securities," including commercial paper, no matter how safe or sound the particular issue may be.[52]

The structure of the Glass-Steagall Act itself confirms that Congress was concerned with more than speculative securities.[53] And, Congress itself has provided exceptions from the Act's prohibitions for those notes and securities it considered

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[51] *Camp, supra,* 401 U.S. at 630. *Accord, Board of Governors, supra,* 450 U.S. at 66; Note, *A Conduct-Oriented Approach To The Glass-Steagall Act,* 91 Yale L. J. 102, 104-108 (1981) *("Yale Note").*

[52] *See, e.g.,* 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley) (mere existence of bank securities operation "no matter how carefully and conservatively run is inconsistent with the best interests of the bank as a whole").

[53] For example, if Congress intended only "speculative" securities to be covered by the Act, it would have been unnecessary for Congress to enact an express exception in Section 16 to permit banks to purchase "investment securities" (that is, securities which are "not predominantly speculative," 12 C.F.R. § 1.3(b)). Congress also has specified in the statute at least fifteen separate U.S. governmental or general obligation securities (that is, very low risk securities) which banks are permitted to underwrite. 12 U.S.C. § 24 (Seventh). These exceptions also would have been unnecessary if Congress had not intended "low risk" securities to fall within the flat prohibition of the Act.

sufficiently low-risk for bank marketing. Where "Congress explicitly enumerates * * * exceptions to a general prohibition, additional exceptions are not to be implied" by the courts or administrative agencies. *Andrus* v. *Glover Construction Co., supra,* 446 U.S. at 616-617; *see also, SEC v. Ralston Purina Co. supra,* 346 U.S. at 126.[54] In short, the fragments of legislative history relied upon by the majority, "regardless of how liberally they are construed," simply do not amount to a clearly expressed legislative intent contrary to the plain language of the Glass-Steagall Act forbidding banks to underwrite all "notes or other securities." *See American Tobacco Co.* v. *Patterson, supra,* 456 U.S. at 75.

The majority also refused to enforce the plain statutory language because Congress did not expressly recite in the legislative history that the Glass-Steagall Act applies to all securities, regardless of "risk" and maturity, and thus applies to commercial paper.[55] Yet, this Court has instructed on numerous occasions that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances."[56] And, even on those occasions where this Court has taken that step, it has never insisted that Congress reaffirm the meaning of the plain statutory language in the legislative history as a condition of enforcing the statute.[57] The majority

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[54] As the district court stated, "[n]owhere in the Glass-Steagall Act is the Board authorized, despite the plain language of the statute, to permit banks to engage in a particular activity because it does not pose risks to consumers or investors" (J.A. 214-215; 519 F. Supp. at 614).

[55] There is no such express statement in the legislative history because, as the majority conceded (J.A. 236 n. 50; 693 F.2d at 145 n. 50), banks had not underwritten commercial paper in the decades preceding the enactment of the Glass-Steagall Act. Rather, the involvement of banks with commercial paper during this period was limited solely to purchasing commercial paper as part of their traditional commercial lending activities. *See, e.g.,* A. Greef, *The Commercial Paper House in the United States* 6-7, 15-18, 403-405 (1938).

[56] *American Tobacco Co.* v. *Patterson, supra,* 456 U.S. at 75 (quoting *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 26 (1977)).

[57] *See, e.g., Harrison* v. *PPG Industries, Inc.,* 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require

(footnote continues)

in effect treated as *law* language that Congress never passed as a bill and that the President never signed, *see, e.g., Schwegmann Brothers* v. *Calvert Distillers Corporation*, 341 U.S. 384, 395-397 (1951) (Jackson, J., concurring), in plain violation of the structure Article I establishes for federal lawmaking. *See INS* v. *Chadha, supra*, 103 S.Ct. at 2782-2788.

In sum, there is nothing in the language or legislative history of the Glass-Steagall Act to support the majority's view that Sections 16 and 21 do not apply to "notes or other securities," but only to "notes or other securities issued to raise money for an extended period of time as part of a corporation's capital structure." As a result, the majority below erred in grafting such a far-reaching distinction on to the Act:

> Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function "to sit as a super-legislature," *Griswold* v. *Connecticut*, 381 U.S. 479, 482, 14 L. Ed. 2d 510, 85 S.Ct. 1678 (1965), and create statutory distinctions where none were intended.

American Tobacco Co. v. *Patterson, supra*, 456 U.S. at 72 n. 6. *Accord, SEC* v. *Sloan, supra*, 436 U.S. at 111-117.

D. Even If A Functional Analysis Were Appropriate To Construe The Statute, A Functional Analysis Confirms That Commercial Paper Is A Note Or Other Security

As demonstrated above, the language of the Glass-Steagall Act plainly establishes that commercial paper constitutes "notes or other securities." The legislative history of the Act confirms what is obvious from its language. Yet, the majority nonethe-

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(footnote continued)

Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark").

less sanctioned the Board's decision to exclude commercial paper from the statute's reach.

It did so by approving the Board's decision to interpret the statutory language through a "functional analysis" and to excise any instrument which is " 'functionally similar to a traditional commercial banking operation' " (J.A. 242; 693 F.2d at 148) or which displays "the economic characteristics of a traditional loan" (J.A. 244; 693 F.2d at 149). Based upon such diverse "features" as the default rates and maturities of commercial paper, as well as the nature and sophistication of its purchasers, the majority held that the Board could exclude commercial paper from the Act's coverage because it constitutes the functional equivalent of a commercial bank loan (J.A. 244-246; 693 F.2d at 149).

As demonstrated below, the Board's "functional analysis" has no place in construing the statutory language. It is without legal foundation, is incapable of evenhanded application, and is inherently at odds with the flat prohibition of the Glass-Steagall Act. Even if use of a "functional analysis" is appropriate, however, a proper application of a "functional analysis" confirms that commercial paper falls within the flat prohibition of the Glass-Steagall Act.

There is nothing in the statute—either in its language or its legislative history—reflecting that Congress intended to authorize the Board to modify the Glass-Steagall Act by means of a functional analysis.[58] This omission is extremely significant, since Congress *has* enacted statutes authorizing administrative agencies, in appropriate circumstances, to modify the literal reach of the statute. Thus, Congress has provided in numerous statutes, including the federal securities laws [59] and *other* banking statutes not applicable here,[60] that the agency need not

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[58] Ironically, Congress has rejected the use of a functional analysis even under the Bank Holding Company Act. Thus, in 1970, Congress refused the Board's request to replace the Bank Holding Company Act's "closely related to banking" test with a "functionally related to banking" test because it found that the functionally related standard constituted an unduly "liberal and expansive approach by the Federal Reserve Board in authorizing non-bank activities." H.R. Conf. Rep. No. 1747, 91st Cong., 2d Sess. 21 (1970), quoted in *Board of Governors, supra*, 450 U.S. at 73 n. 54.

[59] *See, e.g.*, 15 U.S.C. §§ 77b(1); 77ccc(1); 78c(a); 78u(h)(13); 79b(a); 80a-2; 80b-2.

[60] *See, e.g.*, 12 U.S.C. §§ 1730a(a); 1749bbb-2(a).

apply the statute according to its literal terms where "the context otherwise requires."[61] Congress, however, granted no such authority to the banking agencies in the Glass-Steagall Act.[62]

The Board's "functional analysis" also does not provide a principled means for interpreting the statute in a consistent and evenhanded manner. This follows from the Board's failure to identify the controlling principle of interpretation, a failure which pervades every "feature" comprising the Board's functional analysis (*See* J.A. 244-246; 693 F.2d at 149).[63] Indeed, the majority below conceded that, under the Board's functional analysis, there is "no foolproof formula" to determine whether any issue of commercial paper, much less any particular instrument of corporate finance, constitutes a "security" for purposes of the Act (J.A. 241; 693 F.2d at 147).

The reason for this silence is apparent. Once the language and legislative history of a statute are abandoned in favor of a collection of amorphous "features," the resulting interpretation itself can be nothing more than amorphous. Indeed, once the accepted tools of statutory construction are abandoned, all that remains is the sort of unbounded *ad hoc*, case-by-case adminis-

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[61] Congress has enacted at least 58 such statutory provisions. *See, e.g.*, 16 U.S.C. § 715; 19 U.S.C. § 1202; 20 U.S.C. § 1132 (b); 30 U.S.C. § 351; 33 U.S.C. § 1222; 39 U.S.C. § 102 (2); 42 U.S.C. § 4003.

[62] Even if the statute is to be interpreted by examining "features" of the instrument, it is noteworthy that the Board ignored the "features" used by the Office of the Comptroller of the Currency to distinguish loans from securities. *See Comptroller's Handbook for National Bank Examiners*, § 203.1 at 1 (1979) (loans result from direct negotiations between a buyer and lender; securities are acquired through a third-party). These "features" establish that commercial paper, indeed, is a "security."

[63] For example, the majority approved the Board's conclusion that commercial paper resembles a loan and not a security because it is "of very short maturity" (J.A. 245; 693 F.2d at 149). Neither the majority nor the Board, however, identified the maturity date dividing the two. Similarly, the majority held that commercial paper is the equivalent of a loan and not a security because it is marketed only to "sophisticated purchasers" (J.A. 245; 693 F.2d at 149). Yet, the majority and the Board omitted to specify the level of sophistication that distinguishes the two.

tration of the Glass-Steagall Act that Congress expressly rejected fifty years ago, and has rejected to this day.[64]

The Board's "functional analysis" also is an unsound barometer of Congressional intent because its application leads to a series of exceptions that engulf the entire statute.[65] Thus as Judge Robb (J.A. 252; 693 F.2d at 153) and the district court aptly summarized, the Board's functional analysis is fundamentally flawed because it

> would also sweep into its coverage almost all devices used by business to raise capital—including stocks and bonds—transforming transactions unquestionably at the heart of the securities industry into permissible activity for commercial depository banks.

(J.A. 217; 519 F. Supp. at 615).

In any event, proper application of a functional analysis establishes that commercial paper falls squarely within the Act's flat prohibition. The majority's analysis focused solely upon the purported characteristics of commercial paper, and rendered immaterial a bank's *role* in connection with the instrument.

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[64] The majority and the Board plainly envision *ad hoc* administration of the Act. For example, the Board explained in the district court that commercial paper could be a security if it is "marketed widely" (J.A. 192). In turn, the majority below warned that commercial paper could be a security if it were issued in "smaller denominations" or sold "to the general public" (J.A. 250; 693 F.2d at 151). But, because the Board and the majority never defined the terms "widely marketed," "smaller denominations," or "general public," the only manner in which their meaning can be determined is through a series of administrative and judicial proceedings designed to test the facts of each particular case against what little remains of the Act's flat prohibition. Of course, under the Board's functional analysis, this process must be repeated every time an issue of statutory coverage arises with respect to any corporate instrument.

[65] For example, the Board and the majority considered commercial paper the equivalent of a commercial bank loan because its purchasers purportedly function as lenders by providing funds to the issuer in return for its paper (J.A. 246; 693 F.2d at 150). This same process occurs, however, when an investor purchases any equity or debt instrument. *See, e.g., Yale Note, supra*, at 111 n. 75. The majority also held that commercial paper functions as a loan because it has maturities of nine months or less (J.A. 245; 693 F.2d at 149). But, bonds and debentures with maturities of nine months or less are commonplace today, just as they were in 1933. *See Supplemental Appendix*.

Thus, the majority dismissed the difference between a bank's *purchase* of commercial paper and a bank's *marketing* of commercial paper as the bank's simply being "on the other side of the transaction" (J.A. 246; 693 F.2d at 150). Yet, as Judge Robb recognized, this difference in the bank's role "is determinative under the Act," because "[t]he critical distinction between commercial banking and investment banking is the bank's role in the transaction" (J.A. 251; 693 F.2d at 152). *Accord, Yale Note, supra*, at 112-120.

For example, when a bank *discounts* or *purchases* commercial paper, as banks historically have done, the bank is performing its traditional lending function.[66] As Judge Robb explained, the transaction is really no different, for all practical purposes, than if the bank had extended a loan to the issuer in the amount of the discounted value of the commercial paper. In both cases, the bank provides funds to the issuer and derives its revenue from the interest (or discount) accruing to it. And, in both cases, the sole concern of the bank is to assess the loan as a risk (J.A. 251; 693 F.2d at 152).

In stark contrast, when a bank *markets* commercial paper, its role is completely different. The bank is not functioning as a lender, but is functioning as a *promoter*—the traditional role of an investment banker—distributing the issuer's commercial paper to third party investors.[67] When the bank acts in this role, its concern no longer is to assess the commercial paper as a lending risk, but to assess the commercial paper as a vehicle for earning fees or commissions (J.A. 251; 693 F.2d at 152). And, the bank's ability to recoup those fees is dependent solely upon

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[66] As one court has noted, the Glass-Steagall Act was intended "to compel commercial banks to return and confine themselves to their classic time-honored functions: acceptance of deposits of money subject to withdrawal by check or other means; *discount of commercial paper; and making loans.*" *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247, 249 (D.D.C. 1966), *aff'd sub nom., Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968) (emphasis supplied). *Accord*, 77 Cong. Rec. 3835 (1933) (remarks of Rep. Steagall).

[67] *See, e.g.*, 1 L. Loss, *Securities Regulation* 163, 172 (2d ed. 1961, Supp. 1969); W. Steiner, *Money and Banking* 322-334 (1933); *see also, United States* v. *Morgan*, 118 F. Supp. 621, 636-637 (S.D.N.Y. 1953); *Yale Note, supra*, at 104 n. 16.

its success in marketing the paper, and upon its success in competing with securities dealers.

Yet, it is precisely this role—competing as "promoters and sellers of securities" for a fee [68]—that Congress determined to be incompatible with the business of commercial banking, and, that prompted Congress to enact the Glass-Steagall Act. *Camp, supra*, 401 U.S. at 634-637.[69] As this Court observed:

> When a bank puts itself in competition with [securities dealers] the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking.[70]

The most telling indication that the bank's role here is an impermissible one has been provided by the Board itself. During the administrative proceedings below, the Board stated that "the Board is concerned about possible unsafe or unsound practices that would be involved in Bankers Trust's commercial paper activities and in similar activities by any other state member bank" (J.A. 146). In essence, the Board conceded that bank underwriting of commercial paper gives rise to the conflicts of interest, potential abuses, and other financial dangers that prompted Congress to enact the Glass-Steagall Act.

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[68] *See, e.g.*, 77 Cong. Rec. 3907 (1933) (remarks of Rep. Koppleman). *Accord, Hearings on S. Res. 71 before the Subcomm. of the Senate Comm. on Banking & Currency*, 71st Cong. 2d Sess. 1052 n. 24 (1931) (remarks of Sen. Glass) (Congress' goal was to prevent commercial banks from "merchandising" securities); *Yale Note, supra*, at 104-106.

[69] *See* (J.A. 251-253; 693 F.2d at 152-153). *Accord, Yale Note, supra*, at 118. (Banks which underwrite commercial paper are "participat[ing] in the commercial paper market to earn distribution commissions. To earn these commissions requires exactly the promotional, investment banking conduct that Glass-Steagall was designed to foreclose to commercial banks").

[70] *Camp, supra*, 401 U.S. at 637. Or, in the words of Senator Bulkley:

> If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep banks out of the investment security business.

75 Cong. Rec. 9912 (remarks of Sen. Bulkley), quoted in *Camp, supra*, 401 U.S. at 634.

Yet, the Board did not respond by strictly enforcing the Act's flat prohibition. Instead, it sought to alleviate its "concern" through regulation, promulgating guidelines the Board is not authorized to promulgate in an effort to minimize the hazards arising from the commercial paper underwriting activities of all state member banks (J.A. 186-189).

This response was manifestly improper. The Glass-Steagall Act is a prohibitory statute, not a regulatory statute. *See* pp. 11-16, *supra*. And, it is a prohibitory statute because Congress determined fifty years ago that the dangers that arise when commercial banks engage in the investment banking business are too subtle and pervasive to control through case-by-case regulation.[71] The duty of the majority below was to give effect to this legislative judgment, and not, by approving the Board's guidelines,[72] to subvert it.

It thus is of no consequence that allowing banks to underwrite commercial paper under administrative regulation may be more in tune with the Board's view of competition, "current business reality" and the "changing financial needs of our economy." Congress has preempted that kind of administrative judgment:

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[71] The Board confirmed the wisdom of this Congressional judgment when it conceded that its guidelines could only "minimize the danger[s]" that would flow from the commercial paper underwriting activities the Board had authorized (J.A. 185). The default of Penn Central on $82.5 million of commercial paper notes confirms the accuracy of the Board's concession. Only three weeks before the default, Penn Central's commercial paper had been marketed as "prime quality" and sold in large denominations to sophisticated purchasers, and thus would have been permissible for bank underwriting under the Board's guidelines (J.A. 253-256; 693 F.2d at 154-156).

[72] The majority upheld the Board's guidelines based solely upon a citation to this Court's decision in *Board of Governors* (J.A. 248 n. 96; 693 F.2d at 151, n. 96). But, this case, unlike the *Board of Governors* case, does not involve the *Bank Holding Company Act*. This case involves an activity that contravenes the *flat prohibition* of the *Glass-Steagall Act*. As a result, the controlling precedent here is not *Board of Governors*, but this Court's decision in *Camp* where this Court, reversing the Court of Appeals (*NASD* v. *SEC*, 420 F.2d 83, 88, 91, 95 (D.C. Cir. 1969)), held that administrative regulation cannot substitute for Congress' "prophylatic" statutory prohibition. *Camp*, *supra*, 401 U.S. at 639. *Accord*, *Agnew*, *supra*, 329 U.S. at 449 (1947) (The Act is "a preventive or prophylatic measure").

> From the perspective of competition, convenience, and expertise, there are arguments to be made in support of allowing commercial banks to enter the investment banking business. But Congress determined that the hazards outlined above made it necessary to *prohibit* this activity to commercial banks.

Camp, supra, 401 U.S. at 636 (emphasis supplied).

CONCLUSION

The Glass-Steagall Act flatly prohibits banks from underwriting "notes or other securities." The language, legislative history, and purpose of the Act plainly establish that the prohibition encompasses commercial paper notes and securities. Because the majority opinion upholds the Board's contrary ruling, and sanctions the Board's decision to substitute a scheme of administrative regulation in the place of Congress' flat statutory prohibition, the judgment of the Court of Appeals should be reversed and the Board's ruling, as well as its guidelines authorizing banks to underwrite commercial paper, should be declared null and void.

Respectfully submitted,

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November 17, 1983

SUPPLEMENTAL APPENDIX

Interest exempt from all present Federal Income Taxation

$1,500,000

City of Buffalo, New York

0.98% Tax Anticipation Certificates of Indebtedness

Dated December 16, 1935 Due June 16, 1936

Legal Investment, in our opinion, for Savings Banks and Trust Funds in New York State

Price to yield 0.70%

(accrued interest to be added)

HALSEY, STUART & CO. INC. BANCAMERICA-BLAIR CORPORATION LADENBURG, THALMANN & CO.

W. C. GAY & CO.

December 14, 1935.

Exempt from all present Federal and New York State Income Taxation

$1,250,000

City of Utica, New York

1.60% Certificates of Indebtedness

Dated July 20, 1934 Due November 20, 1934

Legal Investment, in our opinion, for Savings Banks and Trust Funds in New York State

Price to yield 1.00%

accrued interest to be added

HALSEY, STUART & CO.

INCORPORATED

NEW YORK, 35 Wall Street · CHICAGO, 201 South La Salle Street

AND OTHER PRINCIPAL CITIES

New Issue

$900,000

National Steel Car Lines Equipment Trust

5% Equipment Trust Gold Certificates, Series "N"

To be unconditionally guaranteed by endorsement both as to principal and dividends by
PALACE LIVE POULTRY CAR COMPANY

To be issued under the Philadelphia Plan

GIRARD TRUST COMPANY, Philadelphia, Trustee.

To be dated April 15, 1931. To mature $50,000 semi-annually from April 15, 1932 to October 15, 1940, both inclusive. Both principal and dividend warrants are to be paid in gold coin of the United States without deduction of the normal Federal Income Tax not to exceed 2% per annum. *The Company will agree to reimburse the Pennsylvania State Tax not to exceed four mills annually upon application as set forth in the agreement.* At the option of the Palace Live Poultry Car Company, these certificates are to be redeemable at 101% of the face amount and accrued dividends on any dividend date upon thirty days notice.

Mr. Ernest R. Brigham, President of the Palace Live Poultry Car Company, has written us a letter covering the issuance of these certificates, from which we summarize as follows:

Under a contract made with the National Steel Car Lines Company, Vendor, this issue of certificates is to be secured through deposit of title with the Trustee to the following standard railroad equipment:

515 steel underframe and steel superstructure poultry cars.

This equipment has a current sound value as certified to by the American Appraisal Company, of $1,373,000, *or more than 152% of the face value of the Certificates to be issued.*

Pending transfer of title to these cars, cash to the full face amount of the certificates will be deposited with the Trustee, to be withdrawn as cars are delivered.

The Palace Live Poultry Car Company is the largest and leading operator of railroad equipment for the transportation of live poultry in the United States.

We offer these certificates for subscription, subject to issuance as and when received and approval of counsel and to prior sale. It is expected that temporary or definitive certificates will be delivered on or about April 15, 1931.

Prices to yield from 4.00% to 5.20% according to maturity

Descriptive Circular on application.

FREEMAN & COMPANY

30 PINE STREET, NEW YORK

EXEMPT FROM ALL FEDERAL INCOME TAXES
TAX EXEMPT IN NEW JERSEY

SHORT MATURITY

$750,000

CITY OF ATLANTIC CITY, NEW JERSEY

2.90% TAX REVENUE BONDS

DUE MARCH 14, 1933

Principal and interest payable at maturity at the Central Hanover Bank & Trust Company, New York City. Bearer bonds in the denomination of $5,000.

Legal Investment for Savings Banks and Trust Funds in the States of New York and New Jersey

Assessed Valuation, 1931	$252,339,074
Net Debt	21,919,632

Population 1930 (U. S. Census)... 65,748

These bonds are general obligations of the City of Atlantic City.

Legality approved by Messrs. Clay, Dillon & Vandewater of New York City

2.75% YIELD

RAPP & LOCKWOOD

60 BROAD STREET NEW YORK

Tel. · TELEPHONE BOWLING GREEN 9-0097-8-9

Exempt from all present Federal Income Taxation

$745,000

Franklin County, Ohio

[illegible]

2¼% Emergency Poor Relief Bonds

Due serially March 1, 1936-44

[illegible]
New York and certain other states

These Bonds are payable primarily from the proceeds of the 1% excise tax levied by the State on gross receipts of public utilities and in addition to this primary means of payment, the bonds, in the opinion of counsel, will constitute general obligations of Franklin County, payable from ad valorem taxes levied against all taxable property therein, without limitation as to rate or amount.

AMOUNTS, MATURITIES AND YIELDS

$65,000, 1936, 0.50%	$77,000, 1939, 1.75%	$92,000, 1942, 2.30%
69,000, 1937, 1.00%	82,000, 1940, 2.00%	97,000, 1943, 2.40%
73,000, 1938, 1.50%	87,000, 1941, 2.20%	103,000, 1944, 2.50%

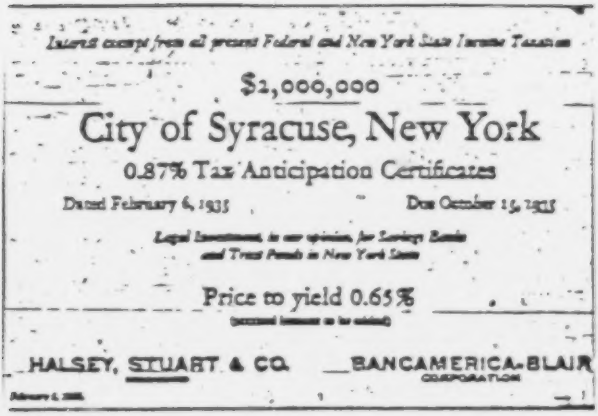
Descriptive circular upon request

HALSEY, STUART & CO. BANCAMERICA-BLAIR

PIPER, JAFFRAY & HOPWOOD

[illegible]

[illegible]



Interest exempt from all present Federal and New York State Income Taxation

$2,000,000

City of Syracuse, New York

0.87% Tax Anticipation Certificates

Dated February 4, 1933 Due October 15, 1933

Legal Investment, in our opinion, for Savings Banks and Trust Funds in New York State

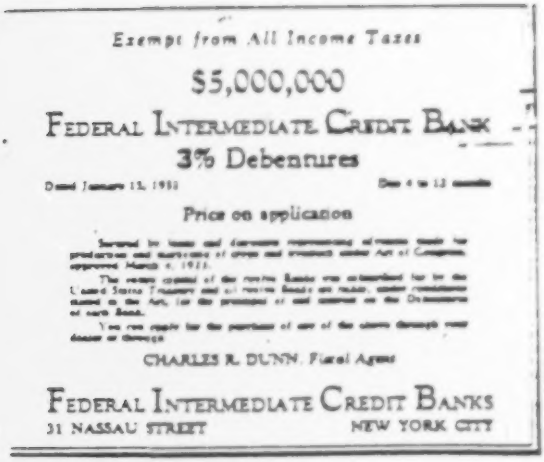
Price to yield 0.65%

(accrued interest to be added)

HALSEY, STUART & CO. BANCAMERICA-BLAIR CORPORATION

February 4, 1933.

WALL STREET JOURNAL



Exempt from All Income Taxes

$5,000,000

FEDERAL INTERMEDIATE CREDIT BANK

3% Debentures

Dated January 15, 1931 — Due 6 to 12 months

Price on application

Issued for loans and discounts representing agricultural paper made for production and marketing of crops and livestock under Act of Congress, approved March 4, 1923.

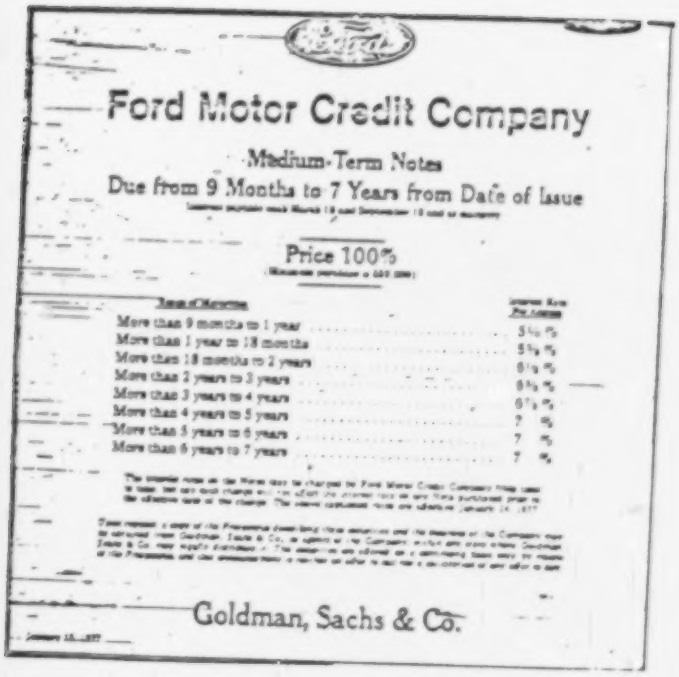
The money received by the various Banks was subscribed for by the United States Treasury and all various Banks are liable, under conditions stated in the Act, for the principal of and interest on the Debentures of each Bank.

You can apply for the purchase of any of the above through your dealer or Banker.

CHARLES R. DUNN, *Fiscal Agent*

FEDERAL INTERMEDIATE CREDIT BANKS

31 NASSAU STREET — NEW YORK CITY



Ford Motor Credit Company

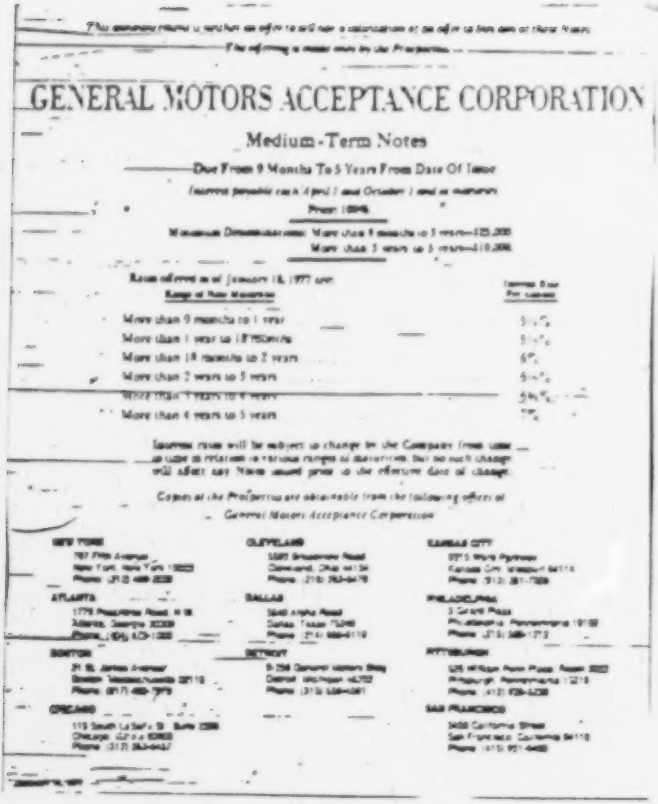
Medium-Term Notes

Due from 9 Months to 7 Years from Date of Issue

Price 100%

Term of Maturity	Interest Rate Per Annum
More than 9 months to 1 year	5½ %
More than 1 year to 18 months	5⅝ %
More than 18 months to 2 years	5⅞ %
More than 2 years to 3 years	6⅛ %
More than 3 years to 4 years	6⅛ %
More than 4 years to 5 years	7 %
More than 5 years to 6 years	7 %
More than 6 years to 7 years	7 %

Goldman, Sachs & Co.



GENERAL MOTORS ACCEPTANCE CORPORATION

Medium-Term Notes

Due From 9 Months To 5 Years From Date Of Issue

Interest payable each April 1 and October 1 and at maturity

Price: 100%

Minimum Denominations: More than 9 months to 1 year—$25,000
More than 1 year to 5 years—$10,000

Rates offered as of January 18, 1977 are:

Range of Time Maturities	Interest Rate Per Annum
More than 9 months to 1 year	5 1/4%
More than 1 year to 18 months	5 1/4%
More than 18 months to 2 years	6%
More than 2 years to 3 years	6 1/4%
More than 3 years to 4 years	6 3/4%
More than 4 years to 5 years	7%

Interest rates will be subject to change by the Company from time to time in relation to various ranges of maturities, but no such change will affect any Notes issued prior to the effective date of change.

Copies of the Prospectus are obtainable from the following offices of General Motors Acceptance Corporation

NEW YORK
767 Fifth Avenue
New York, New York 10022
Phone: (212) 486-3000

ATLANTA
1776 Peachtree Road, N.W.
Atlanta, Georgia 30309
Phone: (404) 873-1300

BOSTON
31 St. James Avenue
Boston, Massachusetts 02116
Phone: (617) 482-7979

CHICAGO
115 South LaSalle St. Suite 2200
Chicago, Illinois 60603
Phone: (312) 263-0457

CLEVELAND
5301 Broadview Road
Cleveland, Ohio 44134
Phone: (216) 749-0479

DALLAS
5646 Alpha Road
Dallas, Texas 75240
Phone: (214) 980-8119

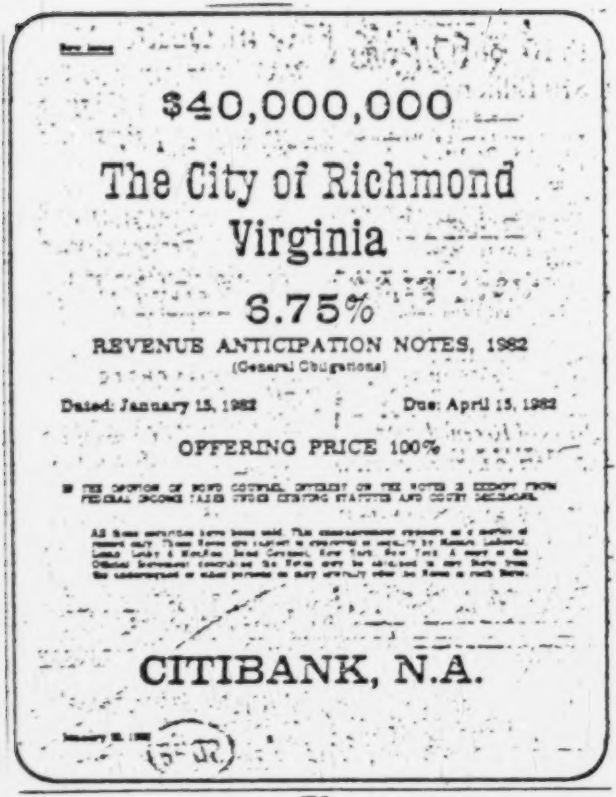
DETROIT
9-258 General Motors Bldg.
Detroit, Michigan 48202
Phone: (313) 556-5001

KANSAS CITY
911 Main Bldg.
Kansas City, Missouri 64105
Phone: (816) 221-7339

PHILADELPHIA
3 Gateway Plaza
Philadelphia, Pennsylvania 19102
Phone: (215) 568-1713

PITTSBURGH
525 William Penn Place, Room 3002
Pittsburgh, Pennsylvania 15219
Phone: (412) 928-5230

SAN FRANCISCO
3600 California Street
San Francisco, California 94118
Phone: (415) 921-6400



$40,000,000

The City of Richmond

Virginia

3.75%

REVENUE ANTICIPATION NOTES, 1982

(General Obligations)

Dated: January 15, 1982 Due: April 15, 1982

OFFERING PRICE 100%

CITIBANK, N.A.

$39,300,000

Kent Hospital Finance Authority

(Kent County, Michigan)

Hospital Facility First Mortgage Revenue Bonds

(Butterworth Hospital) Series 1978

Dated January 1, 1978 Due July 1 and January 1, as shown below

The Series 1978 Bonds are special obligations of the Kent Hospital Finance Authority (the "Authority") payable solely from revenues derived from the Project acquired by the Authority from Butterworth Hospital (the "Corporation") and leased to the Corporation for a net rental sufficient to pay principal of and interest on the Series 1978 Bonds and to maintain a Reserve Account in the Bond Fund. The Series 1978 Bonds are not a corporate general obligation of the Authority within the meaning of any constitutional limitation or charter limitation and do not constitute nor give rise to a pecuniary liability of the Authority, except as described in the Official Statement. Neither the Series 1978 Bonds nor the interest thereon is a charge against the general credit or taxing power of the City of Grand Rapids or Kent County. The Authority has no taxing power.

MATURITIES, AMOUNTS AND COUPON RATES

Maturity	Amount	Coupon Rate	Maturity	Amount	Coupon Rate	Maturity	Amount	Coupon Rate
7-1-78	400,000	3.50%	1-1-84	1,100,000	5.25%	1-1-89	1,150,000	6.00%
1-1-79	400,000	4.00	7-1-84	1,150,000	5.25	7-1-89	1,150,000	6.00
7-1-79	400,000	4.25	1-1-85	1,150,000	5.40	1-1-90	1,050,000	6.10
1-1-80	400,000	4.50	7-1-85	1,150,000	5.40	7-1-90	1,050,000	6.10
7-1-80	400,000	4.50	1-1-86	1,200,000	5.55	1-1-91	1,050,000	6.15
1-1-81	400,000	4.75	7-1-86	1,200,000	5.55	7-1-91	1,050,000	6.15
7-1-81	400,000	4.75	1-1-87	1,200,000	5.70	1-1-92	1,050,000	6.20
1-1-82	1,000,000	5.00	7-1-87	1,200,000	5.70	7-1-92	1,050,000	6.25
7-1-82	1,000,000	5.00	1-1-88	1,150,000	5.85	1-1-93	1,050,000	6.30
1-1-83	1,100,000	5.15	7-1-88	1,150,000	5.85	7-1-93	1,050,000	6.30
7-1-83	1,100,000	5.15						

$8,800,000, 5.50% Term Bonds due January 1, 1998

All Bonds at Par plus Accrued Interest from January 1, 1978

The Series 1978 Bonds are offered when, as and if issued and received by the Underwriters, subject to the approval of legality by Miller, Canfield, Paddock and Stone, Detroit, Michigan. Bond Counsel, and certain other conditions.

The offering of these Bonds is made only by the Official Statement, copies of which may be obtained in any State from such of the undersigned as may lawfully offer these securities in such State.

Ziegler Securities, Inc. B. C. Ziegler and Company

Bache Halsey Stuart Shields

Berg & Co. E. F. Hutton & Company Inc. Merrill Lynch, Pierce, Fenner & Smith

John Nuveen & Co. Paine, Webber, Jackson & Curtis Salomon Brothers

Weeden & Co. Dean Witter Reynolds Inc.

Lehman Brothers Kuhn Loeb Loeb Rhodes, Hornblower & Co.

Matthews & Wright, Inc. The Ohio Company

Wm. C. Roney & Co. L. F. Rothschild, Unterberg, Towbin

Herbert J. Sims & Co., Inc. UMIC, Inc. White, Weld & Co.

Cronin & Marcotte, Inc. Dain, Kalman & Quail A. G. Edwards & Sons, Inc.

Fahnestock & Co. Manley, Bennett, McDonald & Co. Oppenheimer & Co., Inc.

Piper, Jaffray & Hopwood Prescott, Ball & Turben Rowe, Wade & Company

Shearson Hayden Stone Inc. Van Kampen Sauerman Inc. Wauterlek & Brown, Inc.

Russ-MacGregor, MacNaughton-Greenawalt & Co. William G. Ceas & Company

Channer Newman Securities Company The Illinois Company Edward D. Jones & Co.

Miller & Schroeder Municipals, Inc. The Milwaukee Company

Peninsular Securities Company Ryan, Sutherland & Co. Inc. H. B. Shaine & Co., Inc.

Smith, Hague & Co. Thomson McKinnon Securities Inc.

February 9, 1978

Under the provisions of the Acts of Congress now in force, the Notes and the interest thereon are, in the opinion of Bond Counsel, exempt from Federal, State, Commonwealth of Puerto Rico and local taxation.

NEW ISSUE — Standard & Poor's Corporation: AAA

$200,000,000

Commonwealth of Puerto Rico

Special Promissory Notes

Dated December 31, 1981 — Due June 30, as shown below

The Notes will be issued in the forms and payable at the places described in the Official Memorandum related thereto. The Notes will not be subject to redemption prior to maturity except under certain circumstances, as set forth in the Official Memorandum.

Principal of and interest on the Notes will be payable from revenues derived by the Commonwealth from certain previously uncollected taxes and, if necessary, from certain other moneys, and will be additionally secured by an irrevocable letter of credit issued by United States branches of

Bank of America National Trust and Savings Association,
Mellon Bank, N.A.,
National Westminster Bank Limited and
Société Générale.

Neither the credit of the Commonwealth nor that of any of its political subdivisions will be pledged for the payment of the Notes.

$200,000,000 Special Promissory Notes

Amount	Year	Coupon Rate	Price	Amount	Year	Coupon Rate	Price
$ 7,500,000	1982	7.75%	100%	$38,250,000	1985	10.50%	100%
26,500,000	1983	9.00	100	44,250,000	1986	11.30	100
32,000,000	1984	10.00	100	51,500,000	1987	11.50	100

(plus accrued interest from December 31, 1981)

All of these Notes having been underwritten and sold by the undersigned, this announcement appears as a matter of record only.

Merrill Lynch White Weld Capital Markets Group

Merrill Lynch, Pierce, Fenner & Smith Incorporated

Bank of America NT & SA — Mellon Bank, N.A.

January 21, 1982

New Issues

January 27, 1982

Federal Farm Credit Banks

The Thirteen Banks for Cooperatives
The Twelve Federal Intermediate Credit Banks
The Twelve Federal Land Banks

Consolidated Systemwide Bonds

14.30% $1,759,000,000
CUSIP NO. 313311 FJ 6
Dated February 1, 1982 Due August 2, 1982

14.50% $1,349,000,000
CUSIP NO. 313311 FN 7
Dated February 1, 1982 Due November 1, 1982

Interest on the above issues payable at maturity

Price 100%

The Bonds are the secured joint and several obligations of The Thirty-seven Federal Farm Credit Banks and are issued under the authority of the Farm Credit Act of 1971. The Bonds are not Government obligations and are not guaranteed by the Government.

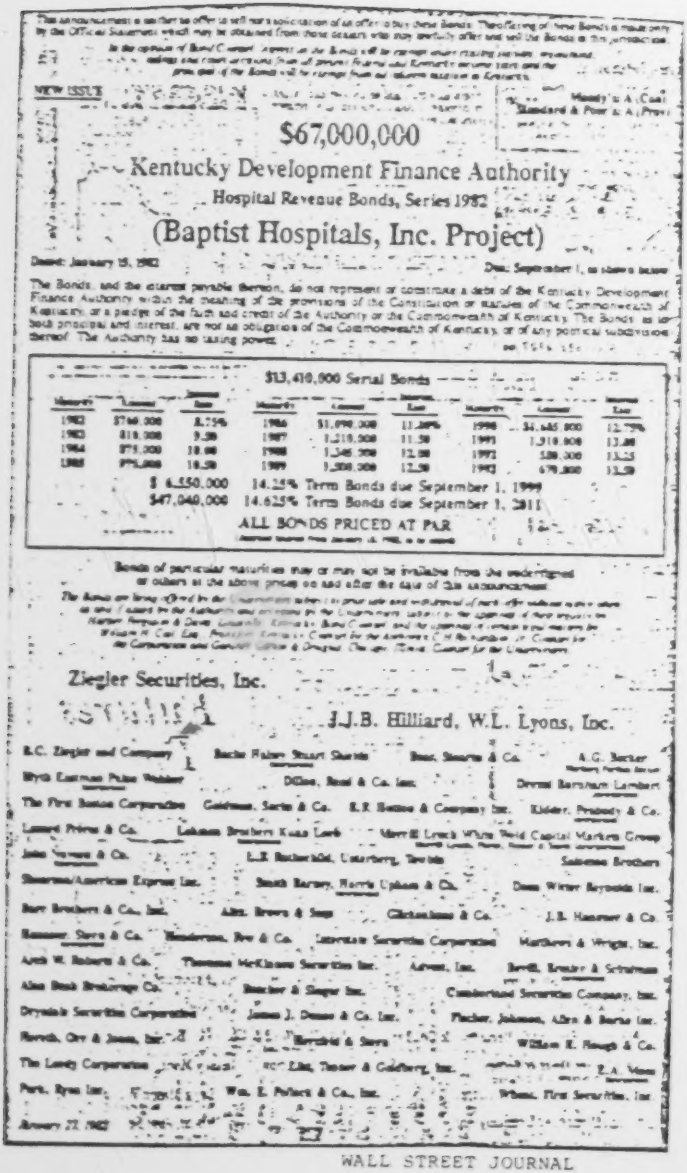
BONDS ARE AVAILABLE IN BOOK-ENTRY FORM ONLY.

Federal Farm Credit Banks
Fiscal Agency
90 William Street, New York, N.Y. 10038

Peter J. Carney
Fiscal Agent

Gerald F. Kierce
Deputy Fiscal Agent

This announcement appears as a matter of record only



NEW ISSUE

Moody's A (Cap) Standard & Poor's A- (Prov.)

$67,000,000

Kentucky Development Finance Authority

Hospital Revenue Bonds, Series 1982

(Baptist Hospitals, Inc. Project)

Dated: January 15, 1982 — Due: September 1, as shown below

The Bonds, and the interest payable thereon, do not represent or constitute a debt of the Kentucky Development Finance Authority within the meaning of the provisions of the Constitution or statutes of the Commonwealth of Kentucky, or a pledge of the faith and credit of the Authority or the Commonwealth of Kentucky. The Bonds as to both principal and interest, are not an obligation of the Commonwealth of Kentucky, or of any political subdivision thereof. The Authority has no taxing power.

$13,410,000 Serial Bonds

Maturity	Amount	Coupon	Maturity	Amount	Coupon	Maturity	Amount	Coupon
1983	$740,000	8.75%	1986	$1,090,000	11.00%	1990	$1,665,000	12.75%
1983	810,000	9.50	1987	1,210,000	11.50	1991	1,910,000	13.00
1984	875,000	10.00	1988	1,345,000	12.00	1992	520,000	13.25
1985	975,000	10.50	1989	1,500,000	12.50	1992	670,000	13.50

$ 6,550,000 14.25% Term Bonds due September 1, 1999

$47,040,000 14.625% Term Bonds due September 1, 2011

ALL BONDS PRICED AT PAR

Bonds of particular maturities may or may not be available from the underwriters or others at the above prices on and after the date of this announcement.

Ziegler Securities, Inc.

J.J.B. Hilliard, W.L. Lyons, Inc.

A.C. Ziegler and Company — Becker Paliney Stuart Shanks — Bear, Stearns & Co. — A.G. Becker

Blyth Eastman Paine Webber — Dillon, Read & Co. Inc. — Drexel Burnham Lambert

The First Boston Corporation — Goldman, Sachs & Co. — E.F. Hutton & Company Inc. — Kidder, Peabody & Co.

Lazard Freres & Co. — Lehman Brothers Kuhn Loeb — Merrill Lynch White Weld Capital Markets Group

John Nuveen & Co. — L.F. Rothschild, Unterberg, Towbin — Salomon Brothers

Shearson/American Express Inc. — Smith Barney, Harris Upham & Co. — Dean Witter Reynolds Inc.

Burr Brothers & Co., Inc. — Alex. Brown & Sons — Citicorp/Citibank N.A. — J.B. Hanauer & Co.

Ranson, Sterr & Co. — Henderson, Rye & Co. — Interstate Securities Corporation — Matthews & Wright, Inc.

Arch W. Roberts & Co. — Thomson McKinnon Securities Inc. — Advest, Inc. — Bartell, Brauler & Schulman

Allen Stock Brokerage Co. — Boettcher & Siegler Inc. — Cumberland Securities Company, Inc.

Dryvale Securities Corporation — James J. Dwyer & Co. Inc. — Fischer, Johnson, Allen & Bertie Inc.

Ranch, Orr & Jones, Inc. — Rothschild & Sterry — William R. Hough & Co.

The Lundy Corporation — Rotan Mosle, Thomas & Goldberg, Inc. — R.A. Vann

Park, Ryan Inc. — Wm. E. Pollock & Co., Inc. — Wheat, First Securities, Inc.

January 22, 1982

WALL STREET JOURNAL

NEW ISSUES February 9, 1982

FNMA FEDERAL NATIONAL MORTGAGE ASSOCIATION

$2,000,000,000
15.50% Debentures

Dated February 10, 1982 Due August 10, 1982

Series SM-1982-P Cusip No. 313586 LQ 0
Non-Callable

Price 100%

$1,000,000,000
15.65% Debentures

Dated February 10, 1982 Due July 10, 1985

Series SM-1985-O Cusip No. 313586 LR 8
Non-Callable

Price 100%

The debentures are the obligations of the Federal National Mortgage Association a corporation organized and existing under the laws of the United States and are issued under the authority contained in Section 304(b) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719 et seq.).

This offering is made by the Federal National Mortgage Association through its Vice President for Finance and Treasurer with the assistance of a nationwide Selling Group of recognized dealers in securities.

Debentures will be available in Book-Entry form only. There will be no definitive securities offered.

John J. Meehan
Vice President for Finance and Treasurer

Allen C. Sell
Director of the Fiscal Office

100 Wall Street, New York, N.Y. 10005

This announcement appears as a matter of record only.

WALL STREET JOURNAL